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01245







IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.

PATRICK CLARK, BENJAMIN C. KINGS-
BURY, JAMES P. HARVEY and A. G.
KERNS, Administrator of the Estate of
JAMES CLARK, Deceased,

Appellants,

vs.

THE BUFFALO HUMP MINING COM-
PANY (a Corporation), and THE EMPIRE
STATE-IDAHO MINING & DEVELOP-
ING COMPANY (a Corporation),

Appellees.

VOL. III

(Pages 817 to 1117, inclusive)

**Upon Appeal from the United States Circuit Court
for the District of Idaho, Northern Division.**



(Testimony of Charles K. Cartwright.)

Q. You found it longer than that on the backs?

A. On the backs, yes, sir.

Q. Was there any evidence of the ore playing out in the faces of those stopes, or the backs?

A. No, sir; there is ore still there.

Mr. HEYBURN.—I now offer in evidence these three samples, which will be put in the sacks we have and marked 1, 2, 3, and 4, offered this morning. Sample No. 1 being from the first strike of ore intersected in the crosscut; at the intersection of the intermediate drift. The No. 2 specimen being from that streak on to the point as shown upon the map, in the trench. No. 3 being a piece representing the width, and taken from the streak near the face of the crosscut which was followed on the east drift. No. 4 being a large sample in a box taken from the southwest corner of the four corners representing the intersection of the crosscut and the intermediate drift, all on the 1,200 foot level.

(Said four samples above offered are marked in the order of their offer Defendants' Exhibits Nos. 15, 16, 17, and 18.)

Whereupon a recess was taken until 2 o'clock P. M., this 30th day of January, 1902.

Cross-Examination.

(By Mr. STOLL.)

Q. When did you go to work for this company, Mr. Cartwright? A. On the 18th of July, 1901.

Q. What was the condition of the stopes in the twelve hundred, at the time you went to work there?

(Testimony of Charles K. Cartwright.)

A. On the twelve hundred?

Q. Yes. A. In the Disputed territory?

Q. Yes.

A. Worked out as far as they had been worked.

Q. What was the condition of the thirteen hundred stopes underneath? A. Partially worked out.

Q. On which end were they worked out most?

A. Are you talking about the disputed territory?

Q. Why certainly, I am talking about the disputed territory.

A. Well, on the thirteen hundred stopes, they were partially worked out.

Q. Which end of them were worked out most?

A. Well, the ground that is in the—

Q. You had two stopes there, you called one No. 1 and the other No. 2? A. Yes, sir.

Q. Which was worked out the farthest?

A. The No. 2 is the one in controversy.

Q. What part of the No. 3 was worked out? The No. 2 stope terminates at the end?

A. Of the Ella line; that was worked out.

Q. You say the No. 2 stope terminates at the Ella line? A. About that.

Q. It terminates at the end of that intermediate drift, doesn't it? A. Yes, sir.

Q. That is not the end of the Ella line?

A. It is about there, I said.

Q. Just come here, please, (looking at map). You call the No. 1 stope the main Poorman stope, don't you?

(Testimony of Charles K. Cartwright.)

A. Yes.

Q. The No. 2 stope begins at this fault, doesn't it, and runs to the end of the intermediate drift?

A. Yes, sir.

Q. And the No. 3 stope begins there and continues through? A. Yes, sir.

Q. Now, what I ask you is this: To what extent was the No. 2 stope exhausted on the thirteen hundred when you went to work there?

A. Well, it was about half out. The lower end there nearest the fourteen was out.

Q. The twelve was all out, was it?

A. Yes, sir.

Q. What is the width of those stopes on twelve; that No. 2 stope? I am speaking of the voids.

A. Average between five and six feet.

Q. What do they average on the thirteen hundred?

A. About the same.

Q. Now, to what extent was the No. 3 shoot exhausted on the thirteen hundred when you went there?

A. I don't know just how much was worked out in there.

Q. Was there as much of the ore extracted from the thirteen hundred on the No. 3 shoot as there was on the No. 2 shoot?

A. The ore on the thirteen hundred No. 2 shoot, that body of ore or shoot of ore we considered about two hundred feet high. All the ore taken out of the No. 2 shoot, it was up even with the twelve hundred foot level, but

(Testimony of Charles K. Cartwright.)

we call it the thirteen hundred because the ore is dropped down to the thirteen hundred foot level and taken out that way, and we speak of it as the thirteen hundred No. 2, although it is above the level of the twelve hundred, and there is very little of that ground in the ground in controversy. But the No. 3 was about half worked out.

Q. How much was the No. 2 shoot worked out?

A. It was about half worked out, about two hundred feet high. It was worked up on a level with the twelve hundred.

Q. One had been worked just about as much as the other when you went to work?

A. No, sir, one had been to the twelve hundred foot level.

Q. Which one? A. The No. 2 shoot.

Q. That is this shoot in the intermediate drift here at this end. The No. 2 shoot beginning at the Poorman line at the point where it intersects what is marked on Plaintiffs' Exhibit No. 2 as intermediate drift, running thence easterly and a distance therefrom westerly you say was practically exhausted from the thirteen to the twelve when you went to work there?

A. There has been no work done from the thirteen to the twelve on the thirteen hundred No. 2 shoot since I have been there, below the twelve hundred.

Q. What was its condition when you went to work there? How much ore was in there; how much had been extracted?

(Testimony of Charles K. Cartwright.)

A. There was none under the twelve hundred level in the thirteen hundred No. 2 when I went to work there.

Q. And there is none there now?

A. If there was not any there then, I don't suppose there is any there now.

Q. Did you work on that same shoot on the eleven, the No. 2 shoot? A. Yes.

Q. What is the width of the voids there?

A. Probably averaged five feet.

Q. Who was it directed you to go and make this examination and dig those trenches on the twelve hundred crosscut of which you testified this morning?

Mr. HEYBURN.—When do you mean? He has been there two or three times.

Q. Concerning which you testified this morning. Who directed you to do that? A. Mr. Miller.

Q. Did he go with you?

A. Not while I was digging, no, sir.

Q. What is the width of the opening there, of the crosscut where you made that trench?

A. Of the intermediate crosscut?

Q. Where did you make that trench?

A. In the intermediate crosscut.

Q. In the intermediate crosscut, what was the width of the crosscut at that time?

A. In the crosscut of the intermediate drift, we made a trench about two feet wide.

Q. What is the width of the opening at the point?

(Testimony of Charles K. Cartwright.)

A. Two feet wide.

Q. You don't understand my question evidently. What is the width of the crosscut or the drift, the opening?

A. The width of the crosscut is about eight feet.

Q. What part of the crosscut did you dig this trench in?

A. I dug the trench in the center of the crosscut.

Q. And what was the width of your trench?

A. About two feet.

Q. Did you dig any other trenches? A. Yes.

Q. Where were they?

A. One west of the crosscut and two east of it in the intermediate drift.

Q. Whereabouts; that is, in the drift proper?

A. In the intermediate drift.

Q. How far from the other trench that you dug?

A. About four feet, about four feet apart.

Q. You also dug a trench on the eight hundred since you were last upon the witness stand? A. Yes, sir.

Q. Whereabouts on the eight hundred?

A. Ten feet either side of the ones we dug there before.

Q. When did you do that? Before you made the raise or since?

Mr. HEYBURN.—Which raise?

Mr. STOLL.—There is only one raise to the eight hundred that I know of.

(Testimony of Charles K. Cartwright.)

A. Well, we could not get into the eight hundred before we made that raise there.

Q. When did you break into the eight hundred with that raise? A. The exact date, I don't know.

Q. Did you have charge of the work?

A. Yes, sir.

Q. Can't you give us the month?

A. Probably in November.

Q. What part of November?

A. Probably about the middle of it, between the first and the middle of November. The date I don't know.

Q. And this raise was made to the eight hundred from this No. 2 shoot was it not? A. Yes, sir.

Q. This same shoot in which you say you found these poor values of which you testified this morning; that is the same one, isn't it?

A. The raise was started I imagine from the 1,100 level.

Q. But it was from the same ore shoot, wasn't it?

A. On the same ore shoot.

Q. Can you tell us what time you dug these trenches in the eight hundred, of which you testified this morning?

A. The exact date?

Q. Oh, I don't care for the exact date. Approximate it, if you can.

A. Well, we dug them after we broke through.

Mr. HEYBURN.—Which was since the last hearing.

Q. You broke through, I think, between the first and

(Testimony of Charles K. Cartwright.)

middle of November. Is that as near as you can come to it?

A. We dug these last four trenches since the first hearing on the 5th or 6th of this month.

Q. When was the hearing before?

A. About the 6th or 7th of January.

Q. Was it the next day? A. No, sir.

Q. The day after that? A. No, sir.

Q. A week after that? A. It was later than that.

Q. Ten days? A. Possibly.

Q. What are the probabilities?

A. Probably ten days.

Q. Do you say it was ten days? A. No, I don't.

Q. What do you say then? Can't you give us some idea? A. It might probably be ten days.

Q. Is that your best belief and judgment and remembrance?

A. Somewhere along there, between that and thirty days.

Q. That would put it about the 16th of January then, wouldn't it?

A. Well, probably it was on the 16th of January.

Q. You are the foreman of that mine, are you not?

A. Yes, sir.

Q. Did you keep no record of your business up there?

A. Yes, sir.

Q. Are you unable to give us any better or more accurate account of when you did that work than when you stated?

(Testimony of Charles K. Cartwright.)

A. I could not give it to you now; I haven't it here.

Q. Where have you got it? A. At Burke.

Q. Did you dig this second trench before or after Mr. Ralston and Mr. Harvey went up there?

A. Before that.

Q. Did you go with them in the eight hundred when they were up there? A. No, sir.

Q. Did you show them where you had dug this trench? A. No, sir.

Q. Or what you found there? A. No, sir.

Q. Why didn't you? A. I was not asked to.

Q. You thought, in view of the fact that they did not ask you, you would not tell them? A. No, sir.

Q. Was the trench open so they could examine it?

A. No, sir.

Q. Did you cover it up again? A. Yes, sir.

Q. What did you do that for? A. We filled it up.

Q. What did you do that for? Were you afraid somebody would see it? A. No, sir.

Q. How deep did you dig that trench?

A. Down to the solid, about a foot deep or fifteen inches.

Q. Did you dig through the solid?

A. To the solid.

Q. Was there a foot of loose matter there that you had to dig through? A. Nearly that.

Q. Was it pretty hard to dig through?

A. No, sir.

(Testimony of Charles K. Cartwright.)

Q. Are you using the eight hundred at the present time? A. No, sir.

Q. You are not running cars through it?

A. No, sir.

Q. How long were those trenches that you dug?

A. The width of the drift, about five feet.

Q. And you dug how many?

A. There have been six dug there.

Q. On the eight hundred, and all about the same width and depth?

A. They are all the width of the drift.

Q. And you covered them all up?

A. We filled them in, yes.

Q. What did you fill them up for?

A. Well, we filled them up because we were through with them.

Q. Did you have any other purpose than that?

A. None that I know of.

Q. No other purpose. Just filled them up because you were through with them? A. Yes, sir.

Q. You have a lock and key on the eight hundred now, haven't you? A. Yes, sir.

Q. When did you put that on?

A. That has been on probably twenty days.

Q. Have you any reason or did you have any reason or can you state any reason now why you did not advise Ralston and Harvey of the fact that you had dug those trenches and filled them up?

(Testimony of Charles K. Cartwright.)

A. I did not suppose that I was up there finding information for these people. They were supposed to find it for themselves.

Q. You were finding it for yourselves? A. Yes.

Q. And then covered it up so that nobody else could find it?

A. They had the privilege of going to the bottom if they wanted to.

Q. Who advised you to cover up those trenches?

A. I had my men cover them up.

Q. Who advised you to have your men do it? Was it Mr. Miller or was that a brilliant idea of your own?

A. That was Mr. Miller's.

Q. Mr. Miller is the assistant manager, isn't he?

A. Yes, sir.

Q. How much ore did you find in the raise to the eight hundred when you broke into the eight hundred?

A. It varied in width from three feet to six inches.

Q. Very good quality of ore was it? A. Yes.

Q. And continued all the way up?

Q. There was ore all the way up.

Q. You say you never found any clean ore within the limits of the Ella ground? A. No, I did not say that.

Q. Didn't you say that? A. No.

Q. Where did you get the piece of ore you sent to the Buffalo Exposition? A. I never sent any there.

Q. You say you never sent any there?

A. No, sir.

(Testimony of Charles K. Cartwright.)

Q. I didn't say you did.

A. Well, you asked me where I got it.

Q. I am speaking of the mining company. Where did the company get it?

A. I could not tell you, sir.

Q. Did you oversee the piece that they sent?

A. No, sir.

Q. You are the foreman of the mine? A. Yes.

Q. Do you know of their sending a large specimen of Helena ore to the Buffalo Exposition?

A. From the Tiger mine?

Q. From the Burke Group of mines.

A. No, sir; I don't know anything about it, never heard of it.

Redirect Examination.

Q. When you speak of the width of the vein or drift at the intermediate crosscut or crosscut and intermediate drift and at various places you spoke of it being so many feet wide, eight feet and five feet wide, do you mean to be understood that the ore was that wide, or the void?

A. The void. He asked me the width of the void or crosscut.

(Witness excused.)

JOHN STONE, being called and sworn as a witness on the part of defendants, testified as follows:

Direct Examination.

(By Mr. HEYBURN.)

Q. What is your position at the Tiger Mine?

A. Miner and shift boss.

Q. How long have you been a shift boss there?

A. Since 1899, the 20th day of September. I started to work on the 10th day of September.

Q. You commenced to work in the mine on the 10th of September, 1899? A. Yes.

Q. Where did you commence work?

A. On the sixteen hundred at the station.

Q. Did you ever work on the twelve hundred?

A. No, I never worked on the twelve hundred.

Q. Did you ever work in the south crosscut from the twelve hundred? A. I never worked in the south.

Q. Were you ever shift boss when the work was being done there? A. Yes.

Q. When did you commence work as shift boss on the twelve hundred?

A. Along about the 20th of September.

Q. How far in was that south crosscut at that time?

A. Fifteen or twenty feet, probably.

Q. Then you worked as shift boss on that work continuously from that time on? A. Yes, sir.

Q. Were you there when they struck the first ore in that crosscut? A. Yes.

Q. How much ore did they strike?

(Testimony of John Stone.)

A. Six or eight inches.

Q. What did they go through after they struck the ore?
A. Went through a horse of waste.

Q. Did they strike any more ore? A. Yes.

Q. About how much?

A. About six inches, again.

Q. Was there any other ore except those two six-inch streaks struck in that crosscut, at any time?

A. No.

Q. You are shift boss, or were, at the time of the running of the drift on the crosscut, were you?

A. Yes, sir.

Q. Did that ore, at any time, become wider than it was at the point you struck it? A. No, sir.

Q. Were you shift boss during the time that the stope was being raised from that intermediate drift?

A. Yes.

Q. State how wide the ore was in that stope.

A. All the way from six inches to a foot.

Q. Was it, at any time, more than a foot?

A. No, sir.

Q. You were shift boss in the running of the east drift from that crosscut, were you not? A. Yes.

Q. State if the six inches of ore that you found in the crosscut continued in running that drift.

A. No, sir.

Q. How far did it continue?

A. About eight or nine feet.

Q. Then, what condition existed?

(Testimony of John Stone.)

A. Pinched out to almost nothing.

Q. What do you mean by nothing?

A. Nothing but a layer of talc and just the wall to go by.

Q. How far did they continue in the east drift?

A. About eighty or ninety feet.

Q. Then, what did you find?

A. I found ore again.

Q. How wide was the ore that you found after that again, in the east drift?

A. About two feet, on the average, probably might be a little more or a little less in places.

Q. What grade of ore was that? Was it clean ore to ship without concentrating? A. No, sir.

Q. About how many tons into one was it?

A. Probably ten to one, or something like that.

Q. Is that a fair statement as to the value of the ore in the east drift? Ten into one? A. Yes.

Q. It was milled in the concentrate, was it?

A. All of it milled.

Q. Was there ever any orders given there that only men who could not speak the English language should be employed in connection with any of that work?

A. No, sir.

Q. How long were you shift boss, or were you shift boss to the time that the work quit on the east drift?

A. Yes, sir.

Q. You were shift boss from the time the crosscut

(Testimony of John Stone.)

was in about twelve or fourteen feet until the work was finished on the twelve hundred foot level?

A. Yes, sir.

Q. Was there ever any time when anyone had any instructions, or without instructions, employed men because they could not speak the English language, or who could not speak it? A. No, sir.

Q. And the men that worked on that work, could they speak the English language?

A. Yes, sir; they can speak English better than I could.

Q. Did you see that piece of rock in the box?

A. Yes, sir.

Q. You and Mr. Cartwright had custody of it?

A. Yes, sir.

Q. Where was that taken from?

A. From the southwest corner, opposite the intermediate drift.

Cross-Examination.

(By Mr. STOLL.)

Q. You went to work there as shift boss in 1899?

A. Yes, sir.

Q. Have you ben working there ever since?

A. Yes, sir.

Q. As shift boss?

A. Pretty nearly all the time.

Q. Are you the shift boss now? A. Yes, sir.

Q. What wages do you get?

A. Five dollars a day.

(Testimony of John Stone.)

Q. Have you a family? A. Yes.

Q. Where were you born? A. Sweden.

Q. How long have you been in this country?

A. Since 1882.

Q. How many Swedes had you working in the drift when you were there in September?

A. I think one worked there for awhile.

Q. Only one? A. Only one.

Q. You say you never heard any instructions being given to employ only men that could not speak the English language? A. Yes.

Q. Who hired the men there? A. Tom Jay.

Q. It is not very likely they would tell you who he was going to hire, is it?

Mr. HEYBURN.—That is objected to as being argumentative.

Q. Was Jay in the habit of telling you whom he was and was not going to hire, and whom he had authority to hire? (This question withdrawn.)

Q. You say you found six inches of ore in a crosscut the first ore you struck? A. Yes, sir.

Q. And then you went through a big horse and struck about a foot?

A. No, between six and eight inches, again.

Q. How big was the horse you went through?

A. About seventeen feet.

Q. Then you got six inches more? A. Yes.

Q. Then what? More horse?

A. No; we did not get no further.

(Testimony of John Stone.)

Q. Then, you only got two six-inch seams of ore in the crosscut? A. Yes.

Q. That would not pay to work, would it? You are enough of a miner to know it would not pay to work six inches of ore?

A. Well, it is none of my business whether it pays or not.

Q. I didn't ask you whose business it was. I asked you if, in your opinion, it would pay to work six inches of ore? A. Why, yes.

Q. It must be pretty good quality of ore, if it pays to work six inches, must it not?

Mr. HEYBURN.—He did not say it would pay to work this six inches of ore.

Mr. STOLL.—Mr. Heyburn, let the witness answer.

Q. Did it pay to work that six inches of ore?

A. I don't know.

Q. What is your opinion as to whether it would pay or would not? A. I suppose it would pay.

Q. They did work it, didn't they?

A. They worked part of it.

Q. They raised that stope above?

A. Yes, sir.

Q. And they drove on it, also, didn't they?

A. Yes.

(Excused.)

CHARLES SWEENEY, being recalled on part of defendants, and sworn, testified as follows:

Direct Examination.

(By Mr. HEYBURN.)

Q. Mr. Sweeney, Albert Allen has testified in this case that he had a conversation with you in reference to the discovery of new ore bodies in the Poorman mine at Burke; and with reference to the fact that you knew of the existence of those ore bodies prior to the purchase of the Poorman mine. Will you state whether or not you had any conversation with Mr. Allen in regard to this matter?

A. No, sir, I never had any conversation with him about it, at all, at any time.

Q. Mr. Allen states that this conversation occurred at your office in the city of Spokane in the spring of 1900. Did you have any conversation with regard to these matters with Mr. Allen at your office at that time?

A. No, sir.

Q. He fixes the time by saying that it was a short time previous to the argument of the case of Rice against Rigley in the Supreme Court of Idaho, and was part of a conversation with reference to the Winslow and Yankee Boy mines, in which he had an interest, in the Buffalo Hump country, and that he was trying to sell you this interest, and that in some way the conversation drifted around and you told him you had an option on the Tiger-Poorman mines for the purchase of them. State the facts in regard to that statement. Did you have any option?

(Tesimony of Charles Sweeny.)

A. No, sir. Mr. Allen had spoken to me once or twice about the Winslow, and that other property there; but at no time did I ever have any conversation with him about the Tiger-Poorman.

Q. Did he have any conversation with you?

A. No, sir.

Q. Now, you may state anything with reference to his statement, wherein he says that during the conversation he asked you some question about the Poorman mine, that he had heard that the mine had been worked out pretty well, and that it was getting pretty expensive to pump. That he asked you some questions about it, and in answer to those questions you told him you had obtained an option on the Tiger-Poorman mine, with the privilege of going down in the mine with a diamond drill and boring some holes in the mine. What are the facts about that?

A. Well, we never had any option on the Tiger-Poorman mine. The purchase of the Tiger-Poorman mine, I don't think, took over fifteen minutes—the actual purchase of it. We had no option on it, and had never been to the mine before we bought it; that is, for several years prior.

Q. That is, you had not?

A. No, I had not, nor any of my men.

Q. That is, you mean the people you were associated with?

A. I mean the men employed by me. I met Mac-

(Testimony of Charles Sweeny.)

Donald on the car one day, and he spoke about the Poorman mine.

Q. (Cross.) Which MacDonald was this?

A. Joe MacDonald. He said he had an option on it, and told me about it, told me the facts about the mine, etc., and the price; that his option was about thirty-five cents, I think, if I am not mistaken. However, I didn't do anything with it, and we thought over the matter awhile, and finally I sent over for Mr. Culbertson. Mr. Culbertson came into the office, and I asked him what they would take for their stock, 600,000 shares. He told me twenty-five cents a share, I think. That was the price he and the old man had agreed upon. I told him to go and get the 600,000 shares and bring it over, and I will give him a check for it.

Q. Did he do it?

A. Yes, sir. Bought and paid for it, and that is all there ever was to it.

Q. Then you never had any option on it, at any time?

A. Never had an option on it for a minute, never sent Mr. Miller to see it. Mr. Miller did not go there until after we bought it. We never had any access to the mine before we bought it, and had never been in it for several years—I had never, for several years prior to the purchase.

Q. He says here that you told him that the reason you wanted it was because Clayton Miller had made an examination of the Poorman mine, and that there was a fault or break in the vein, and that this fault showed

(Tesimony of Charles Sweeny.)

on several levels of the workings. Did you know anything about those things?

A. Mr. Miller never made any examination of the mine; never made any statement about it, until after the purchase, and then he went with me and John Presley and Frank Culbertson, and we looked the mine over after we bought it.

Q. He says you had a sketch of the thing and showed it to him, but claims to have lost the sketch. Is there any truth in that statement?

A. No, sir. That would be a pretty close business connection of mine that I would draw a sketch for and show maps, or any description, and I never heard that Mr. Allen was connected with us in any way.

Q. You have read the statement Mr. Allen made on the witness-stand, have you?

A. No. I understand that he states there that I told him about the 1,800 foot level. The 1,800 foot level is yet to be opened in the Tiger. According to his statement, it was opened two years ago.

Q. He says you told him after you got an option to purchase the mine you got the privilege—or got it at the time—to run diamond drill holes in there, and that they would furnish as many men as you needed to aid you in doing the work?

A. There is absolutely no truth in that, and we never ran any diamond drill holes until after we bought it, quite a while.

(Testimony of Charles Sweeny.)

Q. Did you have any in mind, or contemplate running diamond drill holes at the time you bought it?

A. Well, I rather think I did. I had been doing diamond drill work for a good many years in the Coeur d'Alenes.

Q. But you didn't tell him anything about it?

A. Well, I guess not. I was not in the habit of talking to Allen, that I ever knew of. I never had any business with him in any way.

Q. He uses the expression that you said that when you were buying the Poorman mine you were not buying "a pig in a poke, but buying practically a certainty." Is there any truth in that statement? A. No, sir.

Q. Mr. Sweeny, Mr. Patrick Clark testifies in regard to the deal which was made which resulted in the purchase by the Buffalo Hump Mining Company of the Ella and Missing Link claims, that he made the sale through you; that you came to his office on the 13th of October, 1899, and stated that you wanted to buy his interest in some claims lying around the Ella that your company already owned in. What have you to say about that?

A. The first time I spoke to Mr. Clark about that property was on the street.

Q. What street, and what city?

A. Riverside avenue, about in front of the Exchange National Bank, about the time we were taking the cars to go home, both of us. It was somewhere between the first and fourth or fifth of August.—I mean, of October. And I told him that I intended to buy all the property

(Tesimony of Charles Sweeny.)

through there on both sides. He had some property up there, and if he wanted to sell it, to let me know what they wanted for it, and if we could agree on the price, I would buy it. Mr. Clark said then, he would see about it. That is about all the conversation there was to it. Some time after—it might have been the 13th of October, or it might have been before, but it was about that time—Mr. Clark came into the office, into our office in the Wolverton Building—Clark and Sweeny's office. He sat in the outside office for some little while, as I was very busy in my office, and the first I saw him was when I came out and Mr. Clark was sitting there. Mr. Lew Clark was also there, and Mr. Patrick Clark came into my office, and Mr. Lew Clark, also. And he said that they had agreed upon a price for the property, for their interest in the Ella and Missing Link. He said they had also the Sheridan up there and would like to close the whole thing up. I asked him what he wanted for it. He said they would take four thousand dollars for the four-fifths of it, and he wanted one thousand dollars for his interest in the Ella and Sheridan, and I told him he could bring me the deeds and I would pay him the money. That is all there was to it. I never had any further conversation with him.

Q. Was anything said between you, by either of you, as to the value of the mine, or whether anything had been discovered in it?

A. No, sir, not a word. Mr. Clark had worked the property a long time, and I think he thought he knew

(Testimony of Charles Sweeny.)

more about it than I did. Never asked me a word about it, and I never volunteered any information.

Q. Do you know anything about any arrangement existing between Mr. Clark and any of the plaintiffs and Mr. Culbertson, with reference to the terms upon which Mr. Culbertson acquired the one-fifth interest in the Ella and Missing Link claims? A. No, sir, I do not.

Q. Did you ever know anything about it?

A. No, sir; I never heard anything about it until after this suit started.

Q. Did you ever know or hear anything, prior to the purchase of the interest from Patrick Clark in these claims in relation to any agreement existing between the plaintiffs, or any of them, and Mr. Culbertson, with reference to Culbertson looking after the interests of the plaintiffs in the Ella and Missing Link claims?

A. No, sir, I never heard of it.

Q. Did you ever know anything of the relations that existed between Culbertson and the plaintiffs, or any of them, with regard to this property?

A. Never heard anything about it, at all, until after this suit was started.

Q. Mr. Clark has testified you made the statement that you desired to purchase properties around there in which your company already owned. Did you make any such statement to Mr. Clark at any time?

A. I am sure I did not.

Q. He then says that he asked you what interests you referred to, and that you named the Sheridan and

(Tesimony of Charles Sweeny.)

Ella and Missing Link. That he asked you how you owned in the Ella, and you said you had bought Mr. Culbertson's interest in the Ella and Missing Link. Is there any truth in that?

A. No, sir, not a word of truth in that. I had not bought Mr. Culbertson's interest.

Q. Did you have any interest in the Ella or Missing Link, directly or indirectly, at the time you bought the same four-fifths of Mr. Clark? A. No, sir.

Q. And he says he told you that you could not get his interest for \$500; that you told him you had paid Culbertson \$500 for his interest. Did you ever make that statement? A. No, sir.

Q. He then says he told you you could not get his interest for that; that you talked the matter over, and he asked you why you wanted it, and you said you were forming a corporation and did not want any side partners in there, and that you wanted to get a fraction of ground lying between the claim that you owned and the O'Neil. Is that a fact?

A. No. We never formed any corporation, nor was there any contemplation of it. The property went directly to the Buffalo Hump Company, which was in existence and doing business at the time he sold. All the other property both sides—

Q. What do you mean by both sides?

A. We bought up the Hidden Treasure property on the other end and we bought up the O'Neil property.

(Tesimony of Charles Sweeny.)

Q. Had you bought the O'Neil property at the time you dealt with Mr. Clark?

A. Well, I don't think so; no, I think I bought it afterwards. I am not certain about that.

Q. Had bought a third interest in it, had you not?

A. We had a third interest in that country we purchased of the Poorman-Tiger. We bought that with the Poorman-Tiger, of course.

Q. That belonged to the Buffalo Hump Company?

A. Yes.

Q. Did you state to him that you wanted to get this Ella and Missing Link because it lay in between the O'Neil and the property you already owned?

A. I did not state anything to him about it at all. In doing business whenever I want to buy anything I don't generally give reasons why I want to buy it. I ask whoever has got it for sale what they will take for it, and if the price is satisfactory I generally buy it and do it pretty quick, or else I don't want it at ail. That is the only way I have been in the habit of doing business. And on a small matter of this kind, three or four thousand dollars, I was not fooling around three or four days talking about it.

Q. Have you stated all that occurred in the way of conversation at the time you closed this bargain?

A. Yes, sir.

Q. Do you remember how soon after you told him to bring in his deeds and you would give him a check, that he did bring in the deeds?

(Tesimony of Charles Sweeny.)

A. He brought the deeds in I guess about the 20th. I don't know anything about that.

Q. You were not there at that time?

A. No, I was not a party to bringing in the deeds or paying the money.

Q. He says that you told him the ground of the claims was not worth fifteen dollars for the mineral, but that you wanted it for the reasons already stated. Did you tell him anything about the value of this ground?

A. There never was any question about the value in any way. Mr. Clark never asked me any questions about it, and I never told him. I think he thought, and I think justly thought, that he knew more about the property than I did. He had worked it a good many years. I don't think he thought I could tell him anything about it after having the property two months.

Mr. STOLL.—We object to that, and move to strike out that statement.

Q. He says you finally raised the price to \$4,000 and he sold it to you for that price. Who fixed the price at \$4,000? A. Mr. Clark himself.

Q. Was there ever any other price talked about for it?

A. No, sir. Never made him any offer for it.

Q. He says you then offered him \$2,500 for the Sheridan interest which he refused to take. That you owned a half interest in the Sheridan and you came back in three or four days and raised the price on the

(Testimony of Charles Sweeny.)

Sheridan to \$3,000 and he accepted it. What is the fact about that?

A. I never made any offer on the Sheridan at all. He made the price and I took the property at \$3,000.

Q. Where did he make that price?

A. In my office.

Q. On what occasion?

A. At the same time that we agreed on the price for the Ella.

Q. At the same time, it was a part of the same conversation, was it? A. Yes.

Q. Was there anything ever said between you and Mr. Clark with reference to what had been discovered in the way of values there by diamond drill workings, or by any other class of mining in the Ella and Missing Link claims or near it? A. Not a word.

Q. Did you have any conversation with him in regard to the matter?

A. Not a word.

Q. You refer of course to the time of the deal?

A. Yes, sir, that is what you are asking me about, about the time of the purchase?

Q. Yes. He says you did not make any statement to him with reference to the diamond drill explorations or work. That is a fact I suppose? A. Yes, sir.

Q. He says neither he nor his co-owners knew anything of ore having been struck in the Ella, either by the diamond drill or by the regular mining. Do you know anything about it?

(Tesimony of Charles Sweeny.)

A. No, sir; I don't know a thing of it.

Q. That is, you don't know what they knew. Who made the deal with you for the co-owners and himself?

A. Mr. Clark.

Q. Except Mr. Culbertson? A. Yes, sir.

Q. Was anything said between you and Mr. Clark at any time prior to the closing of the deal or at the time between you and him, as to Culbertson's interest?

A. Not a word.

Q. There was nothing done at the time you agreed to take these properties? A. No, sir.

Q. Nothing until the deeds were delivered?

A. No, sir.

Q. Did you ever have any conversation with Mr. Patrick Clark at his office in regard to any phase or feature of this purchase?

A. I never was in Mr. Clark's office—

Q. In Spokane?

A. In Spokane, over two or three times in my life.

Q. What occasions were those?

A. Well, I could not state the time. I could look it up and find out.

Q. You can tell about how near this time it was?

A. Oh, it was not around this time at all.

Q. Before or after?

A. Well, I am not certain whether it was after or before. I was there different times about other matters.

Q. But not in connection with this business?

A. No, sir.

(Tesimony of Charles Sweeny.)

Q. Did you ever mention at Mr. Clark's office in any conversation the purchase or sale of the Ella and Missing Link or anything in relation to it? A. No, sir.

Q. You can do as you please about telling me what your business at Mr. Clark's office when you went there was.

A. Oh, well, I have been up there on other matters, but nothing to do with this case.

Q. He says that you told him that Culbertson had sold his interest for five hundred dollars, and that Culbertson ought to know as much if not more than Mr. Clark did about the ground; that Clark told you he did not care what Culbertson sold for, that he would not give it for that money, that is, five hundred dollars; that after some talk on the subject you offered him four thousand dollars and that he took it; that this sum was for the four-fifths interest in the Ella and Missing Link. Did you have any such conversation? A. No, sir.

Q. Did you have any conversation with him in which those questions were discussed?

A. Never had any conversation with him, except as I have stated about it, or the purchase of it.

Q. They offered in evidence your annual report made on May 21st, 1901, in regard to these Burke properties, in which you made the statement that there is nothing in the lowest working to show any decrease in the value of the ores, or in their quality or quantity, and that cheap electric power later on for pumping and general purposes, there is no reason why this property should not be

(Testimony of Charles Sweeny.)

worked profitably to a depth of five thousand feet. Have you anything to say about that report?

A. That is correct; I made the report. I suppose it would depend on the value of the ore.

Q. Mr. Clark says, assuming that your judgment was correct in that regard, and that these ore bodies in this ground extended downward into the earth 5,000 feet, with virgin ground above it up to the 800 foot level, this property would, he should say, be worth about a million dollars; that is, the Ella and Missing Link.

A. A pretty good price for 180 feet of ground.

Q. What have you to say about that, that it would or would not?

A. Well, no question at all what it will be worth until by development. It might all turn into first-class A-1 copper ore carrying gold or something, but 180 feet of ground I never saw worth a million dollars to anybody except a company that had facilities to work it and right next to it. They might get some money out of it. If I had it I would be glad to sell it for fifty thousand dollars.

Q. To sell what?

A. That piece of ground, 180 feet.

Q. You mean the Ella and Missing Link claims?

A. Yes, sir; very glad to sell it.

Mr. STOLL.—I move to strike that out.

The WITNESS (Continuing.)—and if anybody will make a reasonable offer I will enter into an agreement

(Testimony of Charles Sweeny.)

to sell it to him. That shows how much we think it is worth.

Mr. STOLL.—We move to strike out the last statement, as not responsive to any question, irrelevant, immaterial and has no place in the record for any purpose whatsoever and volunteered by the witness.

Q. Now you may state your views fully in regard to that, Mr. Sweeny, if you want to.

A. Well, I have said it there, that if anybody will make a reasonable offer for it, in the vicinity of fifty thousand dollars, I will give them a bond to furnish them a deed for the four-fifths interest in the Ella and Missing Link ground.

Mr. STOLL.—I move to strike that out as irrelevant, immaterial and not responsive to any question.

Q. Mr. Clark has made an estimate as to what the cost of equipping this property as an independent proposition would be. You have seen that estimate. Have you any controversy with it?

A. I guess Mr. Clark has got it figured about right.

Q. You own the entire O'Neil claim now, or the company does? A. The company does, yes, sir.

Q. You personally have no interest in this suit at all?

A. No, sir.

Q. And are not a party to it? A. No, sir.

Q. When you used the word "we" you mean the company with which you are connected? A. Yes.

Q. That is what company?

(Tesimony of Charles Sweeny.)

A. The Empire State-Idaho Mining and Developing Company.

Q. Has the Buffalo Hump Company any interest in this property? A. No, sir.

Q. Had no interest in it at the time of the commencement of the suit? A. No, sir.

Mr. STOLL.—That is objected to as not the best evidence, and we move to strike the answer out.

Q. At the time you were talking to Mr. Clark about the purchase of this property, that is when you first talked to him, do you know where the crosscuts were or where the showings were in the way of ore? Can you tell that?

A. Well, I knew we had run a diamond drill hole in the ground out there. I don't know whether it was in this ground or in the O'Neil ground. We knew they had run a diamond drill hole across there, and had some ore.

Q. Do you know how much ore you had, or did you know?

A. No, sir. We have done lots of diamond drill work in the Empire State properties and got some ore, and then drifted to it and then found it did not amount to much.

Q. Tell us about that; give us a little talk about that question.

Mr. STOLL.—We object to that as calling for the opinion of the witness.

Q. Oh, well, I want the facts.

(Testimony of Charles Sweeny.)

A. Well, diamond drill work, that is some of it, with us has proven satisfactory and some of it very unsatisfactory. It is a well-known fact by people who do diamond drill work and by us—I have had a good deal of experience with it—that you may often strike some ore, and it might not go over six or seven feet, and might not go over a few inches, just wide enough for the drill to go through. And of course it may develop a body of ore. The only thing which it would develop satisfactorily, in my opinion, would be that it would not pay very well to run drifts out there if you had done a good deal of diamond drill work and had not found anything.

Q. Then the profit in diamond drill work is largely in what you do not find, is it not?

A. It is a good deal in determining the character of the ground you expect to open up.

Q. Now, Joseph MacDonald testifies that he made an examination of the Tiger-Poorman mine and that he had an option of Mr. Glidden's and Culbertson's stock at thirty-five cents a share, and he says that "F. Lewis Clark and Charles Sweeny spoke to me about taking charge of all their interests in the Buffalo Hump at Burke and Wardner in case they bought the Tiger-Poorman mine." Did you have any such conversation with Joseph MacDonald? A. No such conversation.

Q. At no time?

A. No, sir, Joseph MacDonald has always been antagonistic to us. He has appeared as a witness, as a professional witness against us in nearly every case we

(Tesimony of Charles Sweeny.)

have had, and under no circumstances would we ever employ him, in any confidential position.

Mr. STOLL.—We move to strike out the answer of the witness as not responsive to any question, as irrelevant and immaterial; if offered for the purpose of impeachment it is still irrelevant because the witness MacDonald's attention was not directed to us, and it was cross-examination and he had no opportunity to respond or explain the same.

Q. He says that you also asked him when he could cut loose from the Helena-Frisco people and come with you to take charge of these above-named properties, and that he told you that it would be impossible for him to get away from the Helena-Frisco before the first of the year. Did you have any such conversation with Joseph MacDonald? A. No, sir.

Q. He says that you told him you were very busy and did not have time to attend to all of these matters and that for him (MacDonald) to take charge of all of these; that he could live in Spokane like a white man away from the snows in the Coeur d'Alenes, and that MacDonald told you he would think it over and see about it. Did you have any such conversation with him?

A. No, sir.

Q. He says you asked him if he would act as advisory engineer to look after the development of the Tiger mine and give information as to machinery needed. Did you ever ask him to do such a thing?

(Testimony of Charles Sweeny.)

A. As advisory engineer, no.

Q. Did he ever act as consulting or advisory engineer?

A. Never.

Q. In any property?

A. No, sir. He was interested in the sale of the Tiger to the extent of a commission, and after we purchased it Mr. MacDonald went up there with me and Mr. Culbertson and spoke about improvements that might be put in here and there, and general conversation about the property on the surface; but never had him employed in any capacity, no confidential capacity for us at all, and never employed.

Mr. STOLL.—We object to that as immaterial and not responsive to the question, and move to strike out the answer.

Q. Did you ever contemplate employing Joseph MacDonald as your consulting or advisory engineer in connection with these properties or the Tiger-Poorman properties?

A. Never thought of it; it is unreasonable to expect that we would employ him when he has been an enemy of ours continuously ever since he has been in the Coeur d'Alene country. He has never been friendly to us, and we are not employing men of that description.

Mr. GORDAN.—We move to strike that out as not responsive.

Q. In what way had he opposed you?

A. He appeared as a professional witness against us

(Tesimony of Charles Sweeny.)

in every case we ever had in the country with the Bunker Hill and Sullivan. He was connected with the Bunker Hill and Sullivan people that were opposed to us all the time. He was under Bradley's direct supervision, and is to-day.

Mr. STOLL.—We move to strike out that answer as irrelevant and immaterial, and if offered for the purpose of impeachment it is improper because the witness Joseph MacDonald did not have his attention directed to it, and was not interrogated concerning it, nor given either an opportunity to explain or deny it.

Q. MacDonald says, Mr. Sweeny, that he told you he could not take charge of those mines; that it would take too much of his time.

A. He never could take charge of them with my consent.

Q. That he thought a trip to the mine once a week would be enough.

A. I never had any such conversaton with him.

Q. He says he went through the mine and mill with you and Culbertson and outlined the improvements and "Sweeny said to Culbertson that is settled; have it done that way."

A. Well, I would not dispute that he went through the mill and the mine, because after we went up there and had bought it, and before Joe MacDonald had been settled with for his commission, Joe was around with us several times. And I don't doubt but what that conversation might have occurred as to some improve-

(Testimony of Charles Sweeny.)

ments, but anything Joe MacDonald said never settled anything with me, and I did not say so.

Q. Now, MacDonald says he visited that mine from time to time, in the capacity of advising engineer up to December, 1899, and that the consideration for his services so rendered was to be \$12,500, almost all of which has been paid.

A. I think there was no consideration for any such purpose. Mr. MacDonald released his bond on the Tiger-Poorman property—

Q. Stock, you mean?

A. Yes, sir, on the stock that he had from Glidden. I think I agreed to give fourteen thousand dollars or fifteen thousand dollars, it might be fifteen thousand dollars, I would not be positive, but the settlement was made in my house, and in some matters connected with it there was a sixty thousand dollar debt brought in in the purchase, that we did not know anything about at the time we bought the stock we found that out afterwards, those things that were extra, that they figured in, which we did not expect. Joe and I settled together, and I paid him a check for \$11,250, in full.

Q. In settlement of everything?

A. In settlement of everything.

Q. He never was advisory engineer or in any other capacity?

A. He never was employed in any confidential capacity or in any other capacity, except in connection with that purchase.

(Testimony of Charles Sweeny.)

Q. Now, in speaking of the duties he performed he says he recommended sending Culbertson to Chicago to buy a large Reidler pump to handle the water from the lowest level of the mine.

A. He never had anything to do with that; absolutely no truth in that at all; never had anything to do with it.

Q. He says he recommended raising the gallows-frame and changing the ore-bins.

A. Well, I would not dispute that. He might have spoken of raising the gallows-frame when we were walking around, when we had first bought it. There was a general conversation about matters around there, and I would not dispute that particular thing, because I don't remember.

Q. You say he might have made those suggestions?

A. He might have said something about screens, yes. He was advancing the sale and looking out for his commission and to make his commission as much as possible, I suppose.

Q. Were you dealing with him as belonging to the other side or as belonging to your side of the purchase of the Tiger-Poorman mine?

A. The only thing he had to do with the purchase is that he had an option with Mr. Glidden. Mr. Glidden was unable to sell until MacDonald was got out of the way. So MacDonald had tried to dispose of the property, as I understood, in Butte, Montana. He went up there and tried to see what he could do with it and he

(Testimony of Charles Sweeny.)

could not do anything with it, and I agreed with him that if he would stand out of the road, and we would buy it that we would give him a reasonable commission; there was no specific amount stated. After we bought it, then we had a chat about it, after we bought the stock from Glidden, and I think that we said fourteen or fifteen thousand dollars, something like that, and after that some days after we bought it, this sixty thousand dollar matter of indebtedness against the Tiger-Poorman mine was brought to our attention, which naturally we did not expect, it was a matter that came up, one of the incidents of the trade.

Q. And required the advance of that much money?

A. Required the advance of \$60,000, some of which we paid. So in the consideration of that I had a chat with Joe, and told him it was not as good a trade as we expected it to be and cost a good deal more, etc., and I thought his commission was pretty steep. and we compromised on \$11,500, and I made him my check for it in my library in my house.

Q. Now, he says you came to him and suggested that the foreman at the mine was no good, and wanted MacDonald to get you a good man, and that he sent Thomas Jay to you?

A. That is not true. We found out that Mr. Jay had left the Frisco mine for some reason or other. I believe in regard to a permit, and we were looking for a foreman, we had not had a very satisfactory man, and we thought Jay was satisfactory, so we employed Jay, and had a

(Testimony of Charles Sweeny.)

good deal of trouble to get him. Joe MacDonald entered in between us on the authorities there, and we had a pretty hard job to get that permit for Mr. Jay, altogether through MacDonald's objections to it, until finally I went and got MacDonald and took him down to Wallace, and in my presence he withdrew his objections and the permit was issued. That is the way Mr. Jay came to be employed by us. Mr. Jay had left the Frisco and was not very friendly with Joe MacDonald, so far as we knew, and so far as he stated.

Q. Joe MacDonald says that the drilling in that mine was done on his suggestion made to you.

A. That is not true. I went down through the mine with Mr. Culbertson, along about—well, in August some time, I have not got the date here, and we were speaking about the operations and what we were going to do in the mine and I told Culbertson there was a good opportunity to do some drill work, and that we had drill men down at Wardner, and when I went down to Wardner I would send the drill men up, and that was all I had to do with the drilling. I went away to San Francisco and Seattle and the Hotel Del Monte, etc., and did not get back until after all the drilling had been done.

Q. That is, the drilling in controversy in this action.

A. Yes.

Q. Had Joe MacDonald anything to do with suggesting the doing of this work or the manner in which it was done?

(Tesimony of Charles Sweeny.)

A. Not a word. Mr. MacDonald never did any drilling work in Coeur d'Alenes, that I ever heard of, and he was there ten or twelve years. We were the only people, and the Bunker Hill people at Wardner, that ever did any drill work.

Q. So far as you know?

A. Well, I know that they did not; that is, up until that time.

Q. He says it was done upon his suggestion, and that he outlined the work of the diamond drill to you in the early part of August, 1899?

A. Well, there is not any truth in that. Mr. MacDonald had plenty of chances to do drill work in the Frisco, but nobody ever heard of him doing any; had a very good opportunity to do it there, even up to to-day.

Q. You don't know anything about the cores and the diamond drill, or about MacDonald seeing them, do you?

A. No; if he ever saw them he got down at night or some other time. He never had any opportunity to see them, with my consent.

Q. Did you ever give any instructions that no person who could speak the English language should be employed in connection with either the diamond drilling or the work in that mine?

A. I never gave any instructions about the employment of anybody of any kind. It was always left to the foreman and to the managers.

Q. He says that great care was taken that no one, except Sweeny and Culbertson should know what

(Testimony of Charles Sweeny.)

the result of the diamond drill work was in that part of the mine, where it was driven, or whether any ore was struck.

A. The fact is that while this diamond drill work was done I was in San Francisco and Seattle, until after the drilling was done. I was away all of the time from the time it started until after it was finished; I was not in Burke at all during the time the diamond drill work in controversy in this case was being prosecuted.

Q. He says Culbertson and you told him to say nothing about the developments or the diamond drill work which had penetrated the Ella ground, that you wanted to get that ground from Patsey Clark and his co-owners. Did you ever have any such conversation with him?

A. No, sir; I was not there to have it.

Q. Well, that does not fix any particular time.

A. Well, I never had any conversation with him about it at all.

Q. He says he outlined the direction of the diamond drill work to you on the map and told you the slope of the hole at that point would take you into the Ella ground.

A. Well, that is not true; I never had any conversation with Joe MacDonald, and he could not show a man underground there where those holes could be driven in order to get into the Ella ground, unless he had a survey of it, which none of us had; the maps of the Tiger Company were not kept up to date.

(Tesimony of Charles Sweeny.)

Q. Did you ever go underground to look at the diamond drill works with Joe MacDonald?

A. No, sir.

Q. He was not with you at any time?

A. Not in connection with any diamond drill work

Q. Was the time you were down there with Joe MacDonald before the diamond drill work commenced?

A. Yes, sir.

Q. You were never underground with Joe MacDonald in that mine after the diamond drill work commenced, that is, after you came back from California?

A. No, sir.

Mr. STOLL.—When was the last time?

Mr. HEYBURN.—He says he never was underground with Joe MacDonald after he came back from California.

Mr. STOLL.—Did he say when he was down?

The WITNESS.—Yes, Joe MacDonald was down underground with us before we had done any work and right after the purchase.

Q. At the time you were up there about the 12th of July?

A. The 16th and 17th.

Q. Yes, in July.

A. Yes.

Q. But you never were underground with Joe MacDonald since that time in that mine?

A. No, sir.

Q. He says that this crosscut was driven upon his

(Tesimony of Charles Sweeny.)

suggestion to you; that he discussed the matter with both Culbertson and you, that is the south crosscut?

A. No truth in that; I don't remember the work at all on the crosscuts, but he was not present when they were run or when they were started.

Q. And did not know where it was being run?

A. He did not know a thing about it until long after the work had been done, when I came back from California.

Q. I am speaking of the crosscut that was run after you came back from California.

A. Well, I say I never knew where it was run in the ground; I know where it was; I knew there was a crosscut, but I didn't know whether it was in one piece of ground or the other, and never did know; there were no surveys made.

Q. He says that on October 13th—that is the date of the deal with Clark—both you and Culbertson were aware that the ore had been struck in that crosscut, and that Mr. MacDonald had a conversation with you and Culbertson in regard to it about that time, and that you knew that the ore in the crosscut was in the Ella ground. Is that true or any part of it?

A. Does he say where he had the conversation?

Q. The conversations he undertakes to relate, I will come to by and by.

A. I never had any conversation with him about it at all.

Q. He says you and Culbertson told him at that time

(Testimony of Charles Sweeny.)

that you were going to buy the Ella from Patsy Clark and his co-owners?

A. There is no truth in that.

Q. You don't know anything about the giving of the check to Clark? A. No, sir.

Q. Mr. Clark testifies that he had a conversation with you after you purchased these Ella and Missing Link claims, in which you told him you had an ore body 900 feet high, 600 feet wide, and which appeared on various levels, from the 1,200 up. And that this was three or four months after you bought it. Did you have any such conversation with him, and did you tell him those things?

A. I told Mr. Clark on the car once, going down to his house.

Q. What did you tell him?

A. I told him we had found some ore out on these levels, but no 900 by 600 feet, or any other specified size. I told him we had opened up some very good ore out there.

Q. Did you go into details as to the size of it?

A. No, sir.

Q. Did you tell him on what levels it was?

A. No, sir; I wish to gracious we had that body of ore there, though, 900 by 600, or any other size.

Q. Did you tell him of the ore body being in the Ella or Missing Link, or O'Neil or any other particular claim?

A. I don't think I did tell him any particular claim.

(Tesimony of Charles Sweeny.)

I don't think there was any mention of the ground except it was out there.

Q. Out where?

A. Out east from the Poorman, out in that direction.

Q. Did you really know yourself just where it was with reference to those lines?

A. Three or four months afterwards, probably I knew.

Q. But at the time you talked to Clark?

A. Well, I don't remember the exact time I talked to Clark. It might have been several months afterwards. I know it was quite a while after. I might have known something of where it was by that time. It was a good many months after, I think.

Q. He says when you told him this it aroused his curiosity as to whether it might go into the Poorman extension, and he asked you about it and you said it made a turn and went around through the O'Neil ground?

A. Mr. Clark never mentioned Poorman extension to me. If he had, I would have probably found out what this suit was about here, but I am inclined to think this was about the Poorman extension instead of this small fraction.

Q. What do you mean by that, Mr. Sweeny?

A. I think they would like to sell the Poorman extension.

Q. Who? A. Mr. Clark.

(Testimony of Charles Sweeny.)

Mr. STOLL.—We object to that as being a voluntary statement and not responsive to any question. And is irrelevant and immaterial, and I move to strike it out.

Q. Mr. Sweeny, how often were you in the Ella and Missing Link claims underground or in any way from July, 1899, up to the time you closed the purchase and the deeds were delivered on the 20th of October, of that year?

A. I was in Burke—I have got the exact time I think in my pocket.

Q. Just give us your movements from July, on to October, if you can?

A. Yes, sir, I will give it to you. On the 16th day of July, I went to Burke. I came back to Spokane on the 17th. On the 16th I went down through the mine.

Q. That is after you closed the deal for the Tiger-Poorman, wasn't it?

A. The 16th day of July, 1899. That was right after we bought the Tiger. I went right up the next day after we bought Glidden's stock. Culbertson, Mrs. Sweeny and I went up and met Presley and Miller at Warner, and took them with us. We left Spokane on the 17th, and I was there one day. I was in Spokane on the 18th and 19th of July. On the 20th I left for Seattle. On the 22d and 23d and the 24th I was in Seattle, and en route to San Francisco; went down by steamer and arrived there on the 26th.

Q. Arrived in San Francisco?

A. On the 26th day of July. On the 27th, 28th and

(Testimony of Charles Sweeny.)

29th, I was in San Francisco and left on the 29th for Del Monte. Was en route to Del Monte and around in that lower country and at Del Monte up until the 4th day of August, the 4th and 5th of August, I went to San Francisco. On the 6th, 7th, 8th, 9th, 10th and 11th of August, I was in San Francisco. On the 12th of August, I was en route from San Francisco to Spokane and arrived here on the 14th. I left on the night of the 11th and got here on the 15th. On the 16th I was in Spokane. On the 17th I went up to the Coeur d'Alenes and en route. I was in the Coeur d'Alenes on the 18th, 19th and 20th.

Q. Whereabouts in the Coeur d'Alenes?

A. Well, it don't say exactly, but up there at the mines, probably at Wardner and Burke both. On the 20th, 21st and 22d of August. On the 23d of August, I came down to Spokane. On the 24th I went back to Burke and Wardner. I came down to meet some men from New York who went up with me. On the 24th I went from Spokane to Burke. On the 25th and 26th at Wardner, on the 27th back to Spokane, on the 28th in Spokane, on the 29th in Spokane, and on the 30th I left for Buffalo Hump and was in Buffalo Hump and in Grangeville from the 31st of August until the 30th day of September, 30 odd days. I arrived back in Spokane on the 1st day of October. I was in Spokane on the 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, up to the balance of the month in Spokane.

Q. Mr. Clark says he knew nothing of any parallel

(Testimony of Charles Sweeny.)

vein having been found in the winze or in the drift. State if there was any parallel vein?

A. What winze is that?

Q. Well, in the claim or in the drift. He says he knew nothing whatever of any parallel vein having been found in the claim or in any drift that was being run.

A. I don't know anything about that; I don't know what he knew.

Q. Was there any parallel vein ever found?

A. No, sir, there was no parallel vein found.

Q. What was found?

A. There was found the same ore that he had in the 800, the same vein. Those found on the lower level, that was all.

Q. Mr. Clark testified that you told him that you had the ore on nine different levels, and had mined down to the 1800 foot level; what have you to say about that?

A. Does Mr. Clark say so?

Q. Yes.

A. Mr. Clark knew we did not have any 1800 foot level. I never had any conversation about any 1800 foot level.

Q. What is the lowest level?

A. The lowest level now is the 1700.

Q. It does not reach this ground, does it?

A. No, sir, at the time I spoke to Mr. Clark the 1600 was the lowest we had.

(Tesimony of Charles Sweeny.)

Mr. WOODS.—Mr. Heyburn, there is a mistake there, a misquotation. It is the 800. It is corrected in another place.

Mr. HEYBURN.—I am taking it seriatim. It is all right if the record shows Mr. Clark meant the 800.

Q. He says that he wanted a lease on that Ella and Missing Link ground from you. A. From me?

Q. Yes, or from anybody. Did he ever talk to you about getting a lease?

A. Never spoke of a lease at all.

Q. From anybody?

A. Not from me. I don't know what he did to anybody else.

Q. He never spoke to you about getting a lease from any other person?

A. No, sir. Nobody could do anything with that under a lease. Joe knew he could not do anything with it. As I understand he says he would open the Poor-man shaft. The whole thing was caved down there for three or four hundred feet, and he could not have got in there to save his neck.

Q. Well, the Poorman shaft is only down about a thousand feet, is it?

A. That is all, nine hundred or a thousand.

Q. He says that sometime in the month of July, 1899, he talked with you regarding putting in these diamond drill holes, and that you seemed to be in doubt as to whether there was anything in that drift; that he told you he would get a lease from Clark and his co-owners,

(Tesimony of Charles Sweeny.)

that you would lease to him the old shaft of the Poor-man to hoist out the rock, whereupon you said to let it rest a while and you would think about it.

A. I didn't have any such conversation. He never mentioned anything about any lease. You could not give it to Joe or anybody else.

Q. Did you have any such conversation as this?

A. Never had any such conversation with him. The only way it could have been worked was out through the Tiger-Poorman shaft.

Q. He says about thirty days after this conversation, which would be in August, you told him not to go near Patsy Clark, that you wanted the ground yourself.

A. When does he locate the other conversation?

Q. In July, so this one would be in August.

A. Well, in August, most of the time I was away.

Q. He says you told him you wanted this property yourself and for him not to go near Patsy Clark.

A. Never had any conversation at the time with him.

Q. He says you said you would give him stock at bottom prices so that he could make more money out of it than by leasing it. This conversation was had after the drill hole was in and after MacDonald had told you it had struck ore, and of the ore that had been taken out of the core?

A. Nothing in that.

Q. You mean to say it is not true?

A. Not a word of truth in it.

Q. Did you have any talk about giving him stock at bottom prices?

(Tesimony of Charles Sweeny.)

A. Might have done it when his commission was coming to him.

Q. In lieu of the commission?

A. Might have offered him some stock for the commission, yes, but that was when the first purchase was made.

Q. You would rather have given him stock than money?

A. A little bit rather, yes.

Q. He says he had a conversation with you and Culbertson in the early part of October with reference to the purchase of the Ella ground, and that you told him you were going to buy the ground and get it cheap, and to be careful that nothing got out about the find in the diamond drill holes, and the stringer in the crosscut. Was there any such conversation?

A. Why, no. If I had had any such conversation with anybody, Joe MacDonald would be the last man on earth.

Q. Joe did not suspect you felt that way towards him, evidently?

A. Yes, Joe knew. Joe had been a professional witness against us, and had done some pretty hard work. He knew exactly how we felt towards him.

Q. He says that you in this conversation particularly named Patrick Clark and B. C. Kingsbury as persons from whom this information should be kept, and that you said if they knew they would hold you up for a big sum in making the deal, but if they did not know about the discoveries you could get it for a song?

(Testimony of Charles Sweeny.)

A. Well, there is no truth in it at all. Joe was trying to make it as strong as he could there.

Q. It seems like the usual grade of testimony he has given in this matter? A. Yes.

Mr. STOLL.—We crave permission to enter a mild protest and objection against these splendid impeaching statements made by counsel and the witness, all of which are impertinent and improper and we move to strike them out.

Q. Mr. MacDonald says that at the time the sale was made to you or the company of the Ella and Missing Link he expressed his opinion to you and Culbertson as to the value of the property, and that he told you that taking into consideration the strike in the diamond drill holes and the appearance of the vein in the crosscut, and if the ground was virgin from there to the surface, at the cheap rate at which you could mine it, it would be worth close to a million dollars. Did he have any such conversation?

A. No, sir, there wasn't anything in the ground that we knew at the time of making the purchase that would justify making any very large estimate as to its value, and we did not know whether that diamond drilling at the time of the purchase was in that ground, or not, and we had very little ore in it anyhow, and the crosscut was not very satisfactory. There were two stringers of ore in it and we did not know exactly where the crosscut was. We supposed it was in the Poorman ground.

Q. MacDonald says here that you went into the

(Testimony of Charles Sweeny.)

ground during the time he was advisory engineer about three times, covering a period of six months. Did you go into the ground when he was advisory engineer?

A. He never was advisory engineer. I never knew he was an engineer until he says so himself. Nobody ever claimed he was.

Q. Did you notice in his testimony, the school from which he said he graduated?

A. No, I did not see that.

Q. He says that Clark, meaning the plaintiff, could not have got into the mine without an order from the Court, as you told him to impress upon Mr. Jay the importance of not letting anyone down except the men going to work, and no one into the 1200 foot level, and told him to tell Jay to put men in there who did not speak the English language?

A. What time does he say this? Does he specify any time?

Q. No, he doesn't specify any time.

A. Well, there is no truth in that at all. I never told Jay anything at all.

Q. No, he does not say that. He says you told him to tell Jay:

A. I never told him to tell Jay anything. I never had anything to do with the property at all. If I told anybody to do anything at all it would be Mr. Culbertson. Even if Joe's claim is true that he was advisory engineer, and even if it was true that he was in my employ in that capacity, I never would tell him to go and

(Testimony of Charles Sweeny.)

tell Jay anything. The man in charge of the property would be the man who would get the instructions; in that case, Mr. Culbertson.

Mr. STOLL.—I move to strike that out as not responsive to any question, irrelevant and incompetent.

Q. Did you have any conversation with any person in which you told them, or even suggested or talked about the question of putting men in there who could not speak the English language?

A. No, sir, I never told anybody anything about employing anybody in the property except Mr. Culbertson, and I never told him anything about employing any individuals except when we discussed the question of foreman, and that was Mr. Jay. Mr. Jay was put into the mine at the suggestion of Mr. Culbertson that he was a good man and would like to have him, and we had pretty hard work to get him, too.

Q. You have not given any detailed attention to the width of these ore bodies or the size of them?

A. No, sir, I have not been in the mine for a year and a half, I guess. Yes, I was; I went down to see the pump once after the new pump was running.

Q. He says he wrote you some letters advising you of what was being done and found in this mine; that he wrote you three or four letters to San Francisco. Did you receive letters from Joe MacDonald at any time?

A. Well, see if he did not state the time he wrote them.

(Tesimony of Charles Sweeny.)

Q. He does on cross-examination, but not in this particular place.

A. I never received any letters from Joe MacDonald at all.

Q. About this matter during the time?

A. No, sir.

Q. He says he turned the option over to you for the Poorman stock in May. Is that true?

A. No, sir.

Q. Turned in over in July, did he not?

A. Yes, sir. I don't think it was three days after he told me that he would agree for me to take it off his hands before I bought it.

Q. It was in June was it not that he turned the option over to you?

A. I don't know. It was June 15th we bought, wasn't it, or was it July 15th?

Q. June 15th.

A. Yes, that is the time. It was two or three days before that.

Q. He says he was at the mine three or four times with you. Was he?

A. Well, he might have been. I would not say.

Q. He says he told you the result of the assays of the core taken from the diamond drill; that he thinks he wrote you first he told you afterwards, but does not know the date, but it was in August, sometime. Was that a fact?

A. In August? No, he never wrote me any letters,

(Testimony of Charles Sweeny.)

he never told me anything about the diamond drill cores because I never knew that he knew anything about it. He never mentioned diamond drill cores to me at any time. I remember the date of the purchase now was June 15th, instead of July 15th, and I want to correct my previous statement in saying July 15th.

Q. MacDonald says here that about forty-six to fifty feet in the crosscut about October 13th or a few days prior thereto, there was eight feet of ore, four or five feet being first-class ore, and he marks that on a map. Then he says, "Sweeny went down there sometime in August." That is, went to San Francisco sometime in August; that he got letters from you and wrote to you there about once a week. Is that true?

A. He never wrote any letters to me, and I never received any from him at all. But see if he does not state that he wrote letters to me at San Francisco in September? I think I remember of reading it there.

Q. He says you were talking to him about the ore in a crosscut on October 7th, and asked you to talk no more about leaving the ground?

A. On October 7th?

Q. Yes, and that this was in Spokane. Did you have any such conversation?

A. Well, I was in Spokane on October 7th. I had no such conversation with him.

Q. He says it was in Spokane that you told him you were going to buy the Ella of Clark and that you were going to have the piece of property; that it was after

(*Tesimony of Charles Sweeny.*)

the ore was struck in the crosscut. You say you did not tell him any such thing?

A. Never had any conversation with him about the purchase from Mr. Clark at all, at any time.

Q. He says early in July he had a conversation with you in regard to putting diamond drill holes in this property; that you talked it over in Spokane and Burke, and on the trains. Is that a fact?

A. No, sir; Joe MacDonald never mentioned diamond drills to me because I was in the diamond drill business long before Joe thought of diamond-drilling up there.

Q. Did you ever offer to sell him stock at bottom prices? He says he did not take the offer?

A. I don't know about that. I might have offered to give him stock instead of commission.

Q. He says he had a conversation with you in the early part of October, with reference to purchasing the Ella and you told him that you were going to buy the ground and told him to be careful, that nothing got out about the finds in the diamond drill holes or the strike in the crosscut. This conversation was in the early part of October. Did you have any such conversation with him?

A. No, sir. I left Spokane on the 1st day of September—on the 30th day of August, I mean, for the Buffalo Hump. I was in the Buffalo Hump country the whole month of September. If all of these conversations that MacDonald speaks about had occurred, and the great

(Testimony of Charles Sweeny.)

importance of this ground had been so firmly impressed upon me, I would have stayed at home and tried to buy the ground instead of going to the Buffalo Hump country for a month or six weeks.

(Objected to as argumentative, not responsive, irrelevant and immaterial, and counsel for plaintiffs move to strike it out.)

Q. He says you told him that if Patsy Clark came up into the Coeur d'Alenes he would be a curse up there, that he would employ dynamiters and raise hell. Did you have any such conversation with him?

A. Never. Never had any conversation with him about Patsy Clark at all.

In my former testimony taken in the other office I gave a list of the directors of the two companies from memory, and it was not correct. I now have the exact names of the directors in the two corporations.

Q. (Cross.) What is the date of this list?

A. These are the directors in the companies at the time of the purchase of the property from the Buffalo Hump Mining Company by the Empire State-Idaho Mining Company. I think they are the same directors yet.

Q. You may read the list.

A. The directors of the Empire State-Idaho Company: George W. Young, George Cox, Jr., F. J. Killner, H. C. Strathy, E. J. Barney, Peter B. Bradley, Edwin Packard. Directors of the Buffalo Hump Mining Company: A. G. —————, Thomas O. Callender, Lindley Murray,

(Tesimony of Charles Sweeny.)

T. Magnus, Edwin Packard, Robert S. Bradley, E. J. Barney.

Q. Mr. Sweeny, state whether or not at any time during your negotiation or at any time before or after the negotiations for the purchase of the Ella and Missing Link Claims you have ever made any effort to suppress or misstate any facts in regard to the value or development of that property to the plaintiffs or any one on their behalf?

(Objected to as calling for a conclusion, not for a statement of any fact, leading and suggestive.)

A. No, sir.

Q. State whether or not you made at any time any statement as to the value or condition of that property that was not true as you knew the facts?

(Same objection as last above.)

A. Not so far as I know.

Q. Is there anything else that you desire to say in connection with this matter that occurs to you? You heard the statements made by Jacob Rice as to conversations had with you in regard to this property and what you had done with it. You were present when he testified?

A. No, I was not present. All I know about that was what I saw in the newspaper.

Q. Rice says that he and Mr. Justus were present at a conversation with you in your office in April, 1900. That he went there to clean up a deal on the Big Buffalo property. That you said you had just bought the Tiger-

(Tesimony of Charles Sweeny.)

Poorman at Burke, or had bought it sometime previously for \$250,000, and that you said you would not give the Tiger-Poorman for the entire Buffalo Hump, that you had run a crosscut and struck a magnificent body of ore that was paying dividends of something like \$40,000 or \$50,000 a month. Did you have any such conversations with either Rice or Justus, or in their presence?

A. I may have had that conversation as to the purchase of the property for \$250,000 and that I would not give it for the Buffalo Hump country. Probably I might have said the same thing. I was trading the other fellow for some interest they had.

Q. And you said you had run thirty or forty feet to get this ore body?

A. No, I never mentioned anything about the ore bodies, or any of the details about it. I did not know very much about the details of the property at that time, in April, 1900. I had not been there for quite a while and did not pay any attention to the development.

Spokane, January 31st, 1902, 10 o'clock A. M.

The parties met pursuant to adjournment. Whereupon the following proceedings were had, to wit:

CHARLES SWEENY, being called to the stand, his direct examination was concluded:

(By Mr. HEYBURN.)

Q. Mr. Sweeny, you may state what you paid Mr. Culbertson for the one-fifth interest in the Ella and Miss-

(Tesimony of Charles Sweeny.)

ing Link claims, and the circumstances of the transaction?

A. Well, you mean my actually giving him the money?

Q. Yes, the price paid.

A. The price paid was one thousand dollars. i

Q. Well, state now.

A. I did not pay it to him; it was paid in the office.

Q. Who made the bargain? A. I did.

Q. When and where?

A. Made it at Burke. I asked Mr. Culbertson what he would take for his interest in that fraction, and he stated that he would not put any price on his interest in the fraction until after Mr. Clark and his associates had agreed to take a price, and whatever they would take he would take.

Q. When you did finally purchase it what price did you pay him for it?

A. The same price as I paid the other.

Q. Now, Mr. Sweeny, if there is anything you think of in reference to this matter that you have not testified in regard to, just state it.

A. I do not think of anything else now.

Cross-Examination.

(By Mr. STOLL.)

Q. On yesterday, Mr. Sweeny, you testified that you went to Burke on the 24th of August?

A. I guess I was there on the 24th of August. I can tell you (referring to memorandum).

(Tesimony of Charles Sweeny.)

Q. You testified you went from Spokane to Burke on the 24th of August?

A. Well, I will examine the memorandum and see if that is right. Spokane to Burke on August 24th; that is right.

Q. Now, you say also in that connection that you, on the 20th, 21st, and 22d of August, were either at Burke or Wardner?

A. The 17th, 18th, and 19th, I was in the Coeur d'Alenes, either at Burke or Wardner; and on the 20th I came down to Spokane.

Q. On the 20th you came to Spokane? A. Yes.

Q. How long were you in Spokane then?

A. I was in Spokane on the 20th, 21st, 22d and 23d. On the 24th, I went from Spokane to Burke.

Q. You came down on the 20th?

A. Yes, I came down on the 20th.

Q. And got here on the 20th? A. Yes, sir.

Q. And you were here on the evening of the 20th, the 21st, 22d, 23d, and on the morning of the 24th, you went back to Burke? A. That is right.

Q. You say that you came down to meet some men from New York who went back with you to the mine?

A. Yes.

Q. Who were those men?

A. Mr. Packard, and Mr. Callender went up with me to Burke.

Q. Anybody else?

A. Well, I am not certain. Some of them came in

(Tesimony of Charles Sweeny.)

just that day as a party, and the others came in a day or two afterwards, and we all went out to the Buffalo Hump country.

Q. State all the men that were here from New York at that time.

A. E. J. Barney, Mr. Packard and Mr. Callender were here.

Q. They were from among this list of directors that you gave us yesterday? A. Yes, sir.

Q. Mr. Packard was the president of both companies, was he not? A. Yes, sir.

Q. And you were at that time the general manager of both companies? A. Yes.

Q. Where was Mr. Culbertson at the time you went out to Burke on the 24th? A. He was at Burke.

Q. He was in Burke when you got there?

A. Yes, sir.

Q. Are you sure? A. Yes.

Q. Didn't he go with you from Spokane to Burke?

A. I am pretty sure he did not. I would not swear to it positively, but I know he was in Burke when we went up there, and I think he was at Burke when we got there.

Q. Your best impression is that he was at Burke?

A. Yes.

Q. When you got up there on the 24th, how long did you stay in Burke? A. We were only there one day.

Q. You got in on the evening of the 24th? You left

(Testimony of Charles Sweeny.)

here on the morning of the 24th and you got there towards the evening of that day naturally.

A. Well, let's see. I came from Spokane to Burke on the 24th. On the 25th, I was at Wardner and the 26th, and on the 27th came to Spokane.

Q. What time did you leave Burke on the 25th?

A. Ten or eleven o'clock in the morning, when the train comes down there.

Q. On the morning of the 25th? A. Yes.

Q. Mr. Sweeny, on yesterday you testified—and that I may quote you, I will read from your testimony—as follows: “Q. Now, Joseph MacDonald testifies that he made an examination of the Tiger-Poorman mine, and that he had an option of Mr. Glidden's and Culbertson's stock at thirty-five cents a share, and he says that F. Lewis Clark and Charles Sweeny spoke to me about taking care of all of their interests in the Buffalo Hump, at Burke and Wardner, in case they bought the Tiger-Poorman mine. Did you have any such conversation with Joseph MacDonald? A. No such conversation. Q. At no time? A. No, sir. Joseph MacDonald has always been antagonistic to us, he has appeared as a witness, as a professional witness against us in nearly every case we have had, and under no circumstances would we have employed him in any such confidential position.” Now, have you any qualification to make of that statement in any way? A. No, sir.

Q. That is the exact truth, is it?

A. That is the exact truth.

(Tesimony of Charles Sweeny.)

Q. On the application for the receivership in this case, Mr. Sweeny, you made an affidavit that was filed here, didn't you? A. Yes, sir.

Q. In order that I may be perfectly fair with you (tendering the witness a paper)—

A. Go ahead and read it.

Q. No, I have a copy, and I will hand this to you so that you may follow. Is that your signature?

A. Yes, sir, I guess so.

Q. You swore to that? A. Yes, sir.

Q. I will ask you if in that affidavit you stated, speaking of Joseph MacDonald, "that the said MacDonald during the year 1899, sought to enter the employment of the companies represented by this affiant, and this affiant did consider the propriety of making an arrangement with the said MacDonald for entering the employment of said companies, but because of certain statements made by the said MacDonald which came to the knowledge of this affiant, this affiant concluded that said MacDonald was not reliable in business transactions and could not be believed either in the ordinary course of business or under oath, and therefore broke off all negotiations with the said MacDonald looking towards his employment by any of the companies represented by this affiant." Did you make that statement in that affidavit?

A. Yes, sir, I will just explain it, too. Joe MacDonald proposed to us, to me, that he would like to get that employment from me. I told him I would think about

(Testimony of Charles Sweeny.)

it. I knew that Joe MacDonald had been a witness against us in a good many cases down at Wardner, and what I saw about him is exactly as it is stated there.

Q. This then is the truth?

A. That is exactly what is the matter. And I just considered it adversely all the time.

Q. Then when you stated in your affidavit that you were considering the advisability of employing him that did not state the truth?

A. No, I did not state the advisability of employing him. I was taking his proposition under consideration.

Q. What cases was he a witness in against you?

A. He was a witness against us in the Kirby vs. The Shoshone.

Q. When was that tried?

A. I don't know the exact dates; it was three or four years ago. I can give you the exact date in the office.

Mr. HEYBURN.—About 1897 or 1898.

Q. Was Joe MacDonald a witness in that case against you?

A. Yes, sir, for the Bunker Hill & Sullivan, and also a witness against us in the King case.

Q. When was that tried?

A. That was tried—what time was it?

Mr. HEYBURN.—Two or three years ago.

Q. Two years ago before this transaction?

A. Well, it was about that time. I knew he was in the case. But I am not certain whether the case was

(Tesimony of Charles Sweeny.)

tried in the court right after this or right before this suit, but the other case was tried before that time.

Q. At the time you were considering the proposition of entering the employment of your companies, you knew he was a hostile witness against you in the case that was then pending in the courts of Idaho?

A. I never was considering his proposition, that is with the intention of employing him. Just taking his proposition under advisement.

Q. With a view of misleading him. Was that the purpose?

A. Well, there were pretty hard times in the Coeur d'Alenes at that time.

Q. I didn't ask you that.

A. Well, I am going to tell you. There were pretty hard times in the Coeur d'Alenes at that time. There was a big strike on hand. We had the Tiger-Poorman property; it was in disrepute, with the authorities all through the Coeur d'Alene District. Supposed to have been the hot-bed of all the trouble. So claimed anyhow; I don't say whether it was true or not. Joe MacDonald was with the Bunker Hill & Sullivan people. They were the people that were more in danger than anybody else in that strike. And Joe MacDonald and the Bunker Hill had a great deal to do with controlling the authorities and unions in the Coeur d'Alene District, and we were very anxious to be let alone with that property for fear it would fill up with water; so we just took Mr. Joe's proposition under consideration and let him

(Tesimony of Charles Sweeny.)

figure it out to suit himself, knowing what we would do when we got ready.

Q. For the purpose of conciliating him?

A. That is it.

Q. Then why did you say in your sworn affidavit here "that the said MacDonald during the year 1899, sought to enter the employment of the companies represented by this affiant and this affiant did consider the propriety of making an arrangement with the said MacDonald for entering the employment of the said companies, but because of certain statements made by the said MacDonald which came to the knowledge of this affiant, this affiant concluded that the said MacDonald was unreliable in business transactions."

A. Well, everybody knew that, and I too; yes, sir, the whole country.

Q. Is that part of this affidavit true, that you did consider it and that you turned it down?

A. Just exactly, because I took it into consideration in the way I stated. I let him make his proposition and I let him think what he pleased until I got ready to turn it down.

Q. Then you never did consider it seriously?

A. I never did consider it seriously.

Q. And if such a statement is contained in this affidavit it is not correct?

A. That word "advisability" does not cover it. It was not put in as full in that affidavit as it might be.

(Tesimony of Charles Sweeny.)

Q. Then you did not reject it because of the fact you learned afterwards he was unreliable?

A. Why certainly, I did not learn it; I knew it all the time.

Q. Then that statement in this affidavit is not correct, is it?

A. You can twist that statement to suit yourself, Mr. Stoll.

Q. You have stated now two cases in which Joe Macdonald was an adverse witness to you in litigation?

A. Yes, sir.

Mr. HEYBURN.—And in the Stemwinder case, too?

A. Yes, sir, the Stemwinder case is another one, the third. In fact in all of the cases we have had with the Bunker Hill and Sullivan.

Q. When was the Stemwinder case tried?

A. It was under examination and in court for several years, wasn't it?

Q. I want you to testify:

A. Well, I am trying to find out the dates.

Q. Can you approximate it?

Mr. HEYBURN.—I will give you the dates from the record pretty soon.

Q. Can't you tell from memory, Mr. Sweeny, what year it was in?

A. The Stemwinder case was tried about 1900, I think. In the fall or spring term of 1900; I am not sure which.

(Tesimony of Charles Sweeny.)

Q. What time was the King case tried?

A. It was tried, I think, about the same time, either one of those terms of court, wasn't it?

Q. And what was the other case he was a witness in?

A. In the Kirby case.

Q. When was that tried?

A. That was tried about 1897 or 1898.

Q. What other case was he a witness in against you?

A. Well, Joe was always in every case we had up there. I can't just think of all of them.

Q. Just tell us the cases.

A. Well, there is three of the most important cases.

Q. They were the three most important ones, are they?

A. Yes, sir.

Q. How long have you known MacDonald?

A. I have known Joe MacDonald about eighteen years.

Q. Known him pretty intimately?

A. No.

Q. Known of him pretty well?

A. I knew him, talked to him, shook hands with him; never was intimate with him.

Q. Knew his reputation?

A. Well, I knew it, yes.

Q. What?

A. Yes, sir.

Q. You have known it during all those years, as to what his reputation was?

A. Well, I knew it as his reputation grew, like everybody else with the years as they pass. Not all those years.

(Tesimony of Charles Sweeny.)

Q. You knew it just as well in 1899 as you do now, didn't you?

A. Well, I don't know; I don't think Joe MacDonald in 1899 would claim to be a consulting engineer for somebody, and then go out and testify against them.

Q. Well, with that exception? A. Yes, sir.

Q. You knew it just as well?

A. That is just the same as a lawyer going back on his client. I don't know that he had ever done that before.

Q. How much acquaintance have you had with him since 1899?

A. Not very much. Two or three months in the summer of 1899, and he went away shortly after that.

Q. Now, Mr. Sweeny, there was a case brought in the United States Circuit Court, of the District of Idaho, in the Northern Division, in which John F. Forbis and others were plaintiffs, and the Buffalo Hump Mining Company, this same defendant here was a defendant, and you were a defendant, and Lew Clark and other parties?

Mr. HEYBURN.—You were just asking him if you knew there was a suit brought? Is that the question?

Mr. STOLL.—Well, the question speaks for itself.

A. Well, there was such a suit, yes, sir.

Q. You remember the suit?

A. I remember there was a case of that kind, yes, sir.

Q. Was Mr. Graves your counsel, representing the Buffalo Hump?

(Testimony of Charles Sweeny.)

(Objected to as immaterial.)

Q. Was Mr. Frank H. Graves, Esq., of Spokane, the counsel for the Buffalo Hump Mining Company, in that suit?

A. Well, he was employed in the suit, but whether he was counsel for the Buffalo Hump Mining Company, or for Clark or for me, I don't know. Mr. Heyburn and Mr. Graves were both in the suit I think. I might be mistaken about that; I know Graves was in the suit and I think Mr. Heyburn was.

Q. He had authority to appear there for the defendants anyway? A. I think so, yes.

Q. Do you know that Joe MacDonald was a witness in that case? A. No, I was not there.

Q. I did not ask you whether you were there or not.

A. Well, I don't know a thing about it.

Q. Now, Mr. Sweeny, upon yesterday you testified that at the time you made your deal with Mr. Clark for the four-fifth interest in the Ella, you had no interest in the Ella Mineral Claim? A. Yes, sir.

Q. Either directly or indirectly?

A. Neither directly or indirectly.

Q. You did have an understanding with Frank Culbertson by which you had his interest arranged for prior to that time, didn't you? Didn't you so testify this morning?

A. I spoke to Mr. Culbertson about selling his interest and he said he would not sell it until after Mr.

(Tesimony of Charles Sweeny.)

Clark and his partners sold, and whatever they took for their interest he would take for his.

Q. When was that arrangement made?

A. It was after I came back from the Hump country, I think.

Q. When was that?

A. About October 3d or 4th, along there.

Q. Where was it?

A. At Burke or Spokane, I am not certain which. I would not locate the exact place.

Q. Had you ever spoken to Culbertson before about that?

A. Well, I spoke about it to Culbertson when we first bought that property about buying up that whole territory east and west.

Q. Did you mention the Ella, particularly?

A. Mentioned no particular piece of ground, but all of it, the O'Neil ground, the Ella ground, and the Hidden Treasure on the west end. Just buy right straight through. That has always been the policy I have pursued whenever I had anything to do with a company, to get all of the territory I could. And that is the time I spoke to him first about buying.

Q. You were going to take this, although it looked so very unfavorable and the times pretty hard?

A. It was not pretty hard with the Buffalo Hump Mining Company. That company had plenty of money and was in a position to buy whatever it wanted to. There was nothing hard there that I know of in the mat-

(Testimony of Charles Sweeny.)

ter of buying things. I bought up all the ground that I could buy and proceeded to buy it at once.

Q. What time did Culbertson go east to Chicago to buy that machine?

A. About the latter part of June, I think.

Q. About the 20th of June?

A. I would not say the exact date, but somewhere about there.

Q. When did he come back?

A. Came back about the 15th of July, I think.

Q. During the time that he was east did you have any conference with him, either by mail or otherwise with reference to buying the Ella? A. No, sir.

Q. How soon after his return did you see him?

A. I saw him right away; I was there when he came back.

Q. Did you talk to him about it then?

A. I don't think I did. I don't remember having any special conversation about it.

Q. After your return from California in August, did you have a conversation with him again, about buying the Ella? A. About buying the Ella from him?

Q. Well, from anybody, either from him or any one?

A. I don't believe that I did.

Q. You don't remember that?

A. I don't think I had any conversation with him. I don't think I had any more conversation with him about it except once or twice when I first told him I would buy that ground all through there, and the next time when

(Tesimony of Charles Sweeny.)

I saw him what he wanted for his interest, and he would not put a price until after Mr. Clark and his partner sold out.

Q. Why did he say he would not put a price on it until after they did?

A. Well, he said they had the largest interest and he would let them sell for whatever they wanted to sell for first, and whatever price they would take he would take, that I think was very fair.

Q. Mr. Sweeny, the ore was struck in the drill hole on the 13th of August, was it?

A. Well, I don't know.

Q. How soon after it was struck did you learn that?

A. Well, when I went up—when I came back from California, I think. Of course I don't know, but from hearsay, I think it was about the 4th of August. I was not there, but I think it was struck about the 4th or 5th of August. I came back to Spokane and arrived here about the 4th or 5th of August.

Q. Did you learn of it at that time?

A. I probably learned that a few days after. I went up to the Coeur d'Alenes and probably heard of it then.

Q. Is that your recollection now?

A. Yes, I guess I heard about it as soon as I went up there.

Q. At any rate you heard of it practically the first time you went up to the mine? A. Yes, sir.

Q. Now, Mr. Sweeny, in your affidavit you made in this case, to which I will call your attention again, you

(Testimony of Charles Sweeny.)

used this language: "This affiant says there was never but one diamond drill hole bored into the Ella and Missing Link claims by either of the defendants, or by this affiant, or by their direction, and that the said hole did not start within the Ella ground; and only went a short distance in from the easterly side of the Ella and Missing Link ground, and that there was found in said drill hole only a small ledge of concentrating ore, the value of which could not be ascertained with any degree of certainty, and was not obtained by this affiant until months afterwards."

A. That is true.

Q. Then can you tell us now, with any greater degree of certainty than a moment ago as to when you learned of the strike?

A. When I went to the Coeur d'Alenes about the 14th of August; but we didn't know where the streak was and we did not know that it was very much out of strike. I did not put very much value to the strike, as evidenced by the fact that instead of coming down and trying to buy it of anybody I went off and left it thirty or forty days.

Q. I don't care about that. Do you remember where it was and who it was that advised you of the finding of the ore in the drill hole?

A. Mr. Culbertson.

Q. Where?

A. At Burke.

Q. What, if anything, did you say to him at that time about doing development work in that direction?

A. Why, I told him we would run drifts and see how

(Tesimony of Charles Sweeny.)

big it was or what it was and whether it amounted to anything or not.

Q. Did you tell him they ought to do work out in that direction at that time?

A. I would not be surprised if I did.

Q. What did he say in reply to it, if you remember?

A. I told you that they were doing development.

Q. Out in that direction?

A. No, they were not doing any development except with the drills.

Q. Did he tell you that?

A. I went down and saw it myself. He didn't need to tell me.

Q. But did he tell you?

A. I don't know that he did, and I am not certain that he did not. I cannot tell what general conversation there was.

Q. As a matter of fact they were not doing any work in that particular direction?

A. They had gone away beyond that and put in their drill hole and they were drilling about that time or shortly after, and they drilled north and south both.

Q. Do you know whether or not the crosscut had been started at the time Culbertson advised you?

A. Oh, yes, the crosscut was started long before that while I was away.

Q. Now, Mr. Sweeny, did Mr. Clark give you to understand when you approached him to purchase this

(Testimony of Charles Sweeny.)

Ella claim, that he knew about the development up there of these strikes? A. No, sir.

Q. You made a statement in your affidavit here, which I will call your attention to again: "That at the time of the purchase of the said Ella and Missing Link lode claims the said Clark gave this affiant to understand that he was fully acquainted with the said mining claims and the development thereon or never asked this affiant as to such development or expressed any desire to obtain any further information or make any examination of said mining claims."

A. Well, if that is true he never asked anything about it, and I never told him anything about it. He knew more about the claims, as a matter of fact, than I did. He knew of the ore there was in there on the 800; that was the same ore.

Q. It was down to the 800?

A. Yes, sir, he knew more about them than I did and that was the same identical ore, only it was narrower on the 800, and widened as it went down.

Q. Did he know anything about the strike in the drill hole?

A. I don't think he did; he did not from me.

Q. Did he know about the crosscut being run there?

A. I don't think he did. I know he did not from me. I won't say what he knew, but he didn't know it from me.

Q. Did he know that you had been prospecting his ground at depth?

(Tesimony of Charles Sweeny.)

A. Well, I did not know myself that I had.

Q. You did not tell him that you had?

A. No, and I did not know it.

Q. Did you try to find out?

A. Not until after the drifts were run; then we found out.

Q. Not until after you purchased it?

A. Oh, yes, quite a while afterwards, three or four months, I guess.

Q. Before you purchased it? A. After.

Q. But did you try to find out before you purchased it? A. Why, no.

Q. You didn't care anything about where you were trespassing?

A. Well, we were buying all the ground, and it didn't make any difference particularly where it was.

Q. You intended to buy this anyway and concluded you would prospect it first?

A. No, sir, we did not prospect it, and didn't know we were prospecting it; we thought we were prospecting on our own ground.

Q. Did you attempt to ascertain?

A. No, we didn't have any surveys made.

Q. How many surveyors did you have in your employ at that time?

A. At that time I don't think we had any surveyors.

Q. Didn't you have Mr. Miller?

A. Yes, but he was managing the Empire State Mine at Wardner.

(Tesimony of Charles Sweeny.)

Q. Didn't you have Boothe?

A. I don't know that Boothe was in our employ at the time, or not.

Q. Refresh your memory.

A. Well, I know he has been.

Q. Did you have engineers in your employ at that time?

A. I had Mr. Miller, but Mr. Miller was not doing much engineering. He was running the Wardner property.

Q. Did you keep the progress map there?

A. At Burke?

Q. Yes? A. No, not until afterwards.

Q. And when you purchased from Mr. Clark, he made no inquiry of you of any kind, name or nature as to what you had in your lower workings in the Poorman?

A. I don't think Mr. Clark ever paid any attention to what we had.

Q. I didn't ask you that?

A. He never asked me a word about it and I never told him. The whole transaction did not occupy over fifteen minutes, the purchase of the property.

Q. What was the capitalization of the Buffalo Hump Company at that time? A. Two and a half millions.

Q. How much of the stock did you own?

A. About a tenth.

Q. How much did Lew Clark own?

A. About a tenth.

Q. You were the general manager at that time?

(Tesimony of Charles Sweeny.)

A. Yes, sir.

Q. One of the promoters of the company?

A. Yes, sir.

Q. What was the stock worth at that time?

A. About \$10.

Q. That was pretty publicly known?

A. What?

Q. The value of the stock. A. Yes.

Q. And in the face of that Mr. Clark put a price of \$4,000 upon this property and never made even an inquiry of you as to what you had at depth?

A. The Poorman-Tiger didn't have anything to do with it.

Q. Answer the question.

Mr. HEYBURN.—Make your own answers, Mr. Sweeny.

A. The Poorman-Tiger had nothing to do with this proposition.

Q. (The question was read.)

A. Never made any inquiry about the Poorman. The company owned the Poorman-Tiger properties, and owned lots of properties in the Buffalo Hump Country.

Q. And Mr. Clark— A. Hold on a minute.

Q. But you are not answering the question.

A. Yes, sir, I am answering the question. I am going to explain it. That is where the value of the stock came. It was on the Poorman-Tiger properties. It had a shoot of ore of a thousand feet long, somewhere between 900 and 100 feet, and on the prospective values

(Testimony of Charles Sweeny.)

of the Buffalo Hump properties that was the value of the stock. The stock was not based on this little fraction.

Q. Did Mr. Clark ask you what depth you had on the Tiger-Poorman mine?

A. He never asked me a word about the mine in any way. Mr. Clark thought he knew more about the mine than I did, and I believe he did.

Q. How do you know he thought that?

A. Because he operated it six or seven years and I never had operated it.

Q. You base your belief on that. Now, Mr. Sweeny, I would like to have you give me a direct answer to this question if you can do so. Do you think you had a right, and that it was quite fair dealing for you to prospect that depth in adjoining ground to that which you owned, and then attempt to purchase either that or the adjoining ground to that without advising the parties from whom you were purchasing as to what you had done—

Mr. HEYBURN.—I object to that as immaterial.

Q. (The question was read.)

A. Had a right to purchase it? Well, I didn't think there would be anything very wrong in that, no.

Q. You didn't think, what?

A. I didn't think there would be anything very wrong about that if I operated in my own territory, and from operations in my own territory got an idea as to what other things were worth, I certainly would not go on telling the whole United States about it so that they

(Tesimony of Charles Sweeny.)

could come around and place all kinds of values on it, if I wanted to buy it. It would not be business.

Q. Would you feel that you should tell the owners, to say nothing about the United States generally?

A. Why, I was supposed to be the owner of the territory in which the work was done.

Q. But I am talking about the territory you were intending to purchase. Do you think it would be entirely fair that you should suppress from them all knowledge of what you were doing there?

A. Suppressing from them all knowledge of what I was doing where?

Q. In that territory, in that ground.

A. What ground are you referring to?

Q. Any ground that you intended to purchase.

A. I was not doing anything in any ground that I really knew where I was doing it, except the O'Neil ground and the Poorman.

Q. You could know? A. How could I know?

Q. The fact that you did not know was your own fault therefore.

A. I should think the fact that these other fellows did not know was their own fault, too. If they had come around and asked any question about it they probably could have found out all about it.

Q. You knew you owned an interest in the O'Neil claim? A. I knew I owned it, yes.

Q. And you knew Patrick Clark knew that also?

A. Why, certainly.

(Tesimony of Charles Sweeny.)

Q. The fact is Mr. Clark purchased that interest in the O'Neil while he was manager of the old Poorman company, for the company, didn't he? A. Yes.

Q. Now, did you know you were working in the O'Neil ground?

A. That is where we supposed we were working. And we started as it proved afterwards, in the O'Neil ground.

Q. You must necessarily have known you had gone through the Ella? A. No, sir.

Q. In order to get to the O'Neil?

A. Oh, we passed through it in the drift, certainly.

Q. And you were using that drift for the purpose of prospecting to the south?

A. We were using privileges that were open to go through there.

Q. You were using this drift through the Ella?

A. It is evident from all the evidence that the Poor-man-Tiger drove these drifts, and we owned the company, and we were entitled to go through unless somebody objected.

Q. And nobody did object? A. No, sir.

Q. Did you make any attempt at any time to ascertain where the lines of the O'Neil claim were?

A. No, sir.

Q. No attempt? A. No.

Q. You simply prospected out in that direction, feeling sure that you owned the O'Neil and had a right to do as you pleased out there?

(Testimony of Charles Sweeny.)

A. Why, yes, we had an interest in it and had a right to do as we pleased.

Q. Did you make any attempt to locate the lines of the Poorman claim on the east? A. No, sir.

Q. Never attempted that?

A. No, Mr. Culbertson attended to that and I did not pay any attention to it.

Q. He was your superintendent?

A. He approximately went to work where the supposed lines were.

Q. He had authority to act for the company?

A. Undoubtedly.

Q. The Poorman is a patented and surveyed claim, is it not? A. Yes, sir.

Q. The Ella is a patented claim? A. Yes, sir.

Q. The O'Neil is patented? A. Yes, sir.

Q. Those lines were all established by United States mineral monuments so that they could be determined with absolute accuracy? A. On the surface, yes.

Q. They can be at depth too, can't they?

A. Why, certainly, by surveys.

Q. Do you know where Mr. Culbertson was on the 13th of October, the day you saw Mr. Clark with reference to the purchase of the Ella? A. No, I do not.

Q. Was he in Spokane? A. Well, I don't know.

Q. What is your impression?

A. I did not see him.

Q. What is your recollection?

A. I did not see him. He might have been in Spo-

(Testimony of Charles Sweeny.)

kane without my seeing him, and he might have been at Burke. I don't know where he was.

Q. You kept in pretty close touch with him?

A. When he came into the office.

Q. If he came into town he usually reported to you immediately, didn't he?

A. Oh, no, he did not. He had lots of business in town besides ours. He might have been over at the bank.

Q. But what time of day was it on the 13th when you met Mr. Clark in front of the Exchange National Bank?

A. Oh, I did not say I met him on the 13th in front of the Exchange National Bank at all.

Q. What day did you meet him there?

A. Somewheres from the 3d or 4th or 5th or 6th, around there, several days before the sale was made.

Q. What time of day was it you met him there?

A. Going home in the evening.

Q. Waiting for a car, was he?

A. We both generally went to that corner and got on the Pacific avenue car.

Q. This was a very small matter to you, wasn't it, Mr. Sweeny, just a mere trifle; you didn't pay much attention to it?

A. Well, I really did not, to tell you the truth.

Q. A little matter of three or four thousand dollars?

A. I didn't pay very much attention to it, no.

(Tesimony of Charles Sweeny.)

Q. What did you say to Mr. Clark when you met him there?

A. I told him we would buy what properties he had up there; we were thinking of buying all the properties through there. He had some interests up there and if he would let us know what he wanted for them we would buy them. He said he would see about it, and that is all there was about that.

Q. How long have you known Mr. Patsy Clark?

A. Oh, about eighteen years.

Q. He is a mining man? A. Yes, sir.

Q. Experienced? A. Yes, sir.

Q. The fact is, he was the original promoter of the old Poorman mine? A. I think so.

Q. Of which your group at Burke is one? A. Yes.

Q. He worked that mine as general manager down to about ten hundred?

A. Yes, sir, I think so; I am not certain; down there somewhere.

Q. That old mine paid a great many dividends, didn't it? A. I think it paid about \$300,000.

Q. You applied to Mr. Clark for the claim. Mr. Clark knew that you were the general manager of the company that owned the Poorman, didn't he?

A. Yes.

Q. He knew you were doing extensive work there, didn't he?

A. Well, he knew we were doing all the work we could considering the labor conditions; I suppose he did.

(Tesimony of Charles Sweeny.)

Q. He knew a new company with new capital and new blood had taken hold of the old property and was pushing it forward pretty fast?

A. Doing the best they could under the conditions.

Q. Under the energetic management of yourself and Mr. Culbertson?

A. If I had my hat on I would take it off to you.

Q. When you approached him and said to him, "If you put a price on your interest in the Ella, in the Sheridan—"

A. No, I never mentioned the Sheridan.

Q. In the Ella then?

Q. That is what I referred to.

Q. And that was all that was said?

A. I told him if the price was right we would buy it, yes.

Q. That is all that was said, was it?

A. That was about all I remember having said about it.

Q. How long were you talking there?

A. Oh, it wasn't over two minutes.

Q. Just a few minutes? A. Yes.

Q. The matter was not of sufficient consequence to spend any time over. Mr. Clark under those circumstances—

Mr. HEYBURN.—Hold on, let him answer the question.

A. Neither Mr. Clark or I was spending much time about it.

(Tesimony of Charles Sweeny.)

Q. He did not ask you how deep you were in the Poorman adjoining the Ella?

A. Why, he knew as much as to how deep it was as I did, and more. No, he never asked me anything about it.

Q. How do you know that he knew the depth of the Poorman workings?

A. Everybody knew it; it was public property. Every man in the Coeur d'Alene country, or in this country.

Q. Did you publish it in the newspapers?

A. Well, it was published in the newspaper about that time that we were doing diamond drill work up there.

Q. Then that was public?

A. I believe so, yes.

Q. And still Mr. Clark, with all this publicity that was given to the whole proposition, never even asked you whether you had found anything at depth in your lowest workings on the Poorman?

A. It would not have made any special value to that property—

Q. Just answer the question.

A. I will answer it in my way, if you please. It would not have made any special difference to that property what was found down there. That property was absolutely of no value to anybody but the people who owned the Tiger-Poorman ground, on Mr. Clark's own evidence. It would cost \$330,000 to get down there

(Testimony of Charles Sweeny.)

to get out a pound of ore. Now, I will sell the ground for pretty nearly fifteen per cent of that money.

Q. Did you authorize Mr. Heyburn to make that same bluff in New York, to sell it for \$50,000?

A. Mr. Heyburn never made any bluff in New York that I know of.

Q. Did you authorize him to make that proposition in New York, to sell it for \$50,000 and did he tell you that his bluff was called, and that he could not deliver?

A. I never heard anything of it.

Mr. HEYBURN.—Oh, tommyrot. Put that in.

A. I never heard anything about that. You can call the bluff now.

Q. Well, let us go back now to our original question, and don't wander so far, and if you will answer my questions without putting in a speech in every instance we will get along a little better. Let the stenographer read the original question.

Q. (The last question on the preceding page was read.)

A. Never asked me anything about it.

Q. He asked you nothing about having purchased Mr. Culbertson's interest?

A. No, sir.

Q. Not a thing of that kind?

A. No, sir.

Q. The next time you saw him he waited until the 13th, didn't he?

A. I can't say at all about that date; I would not say the exact date. It might have been the 11th, 12th or 13th.

(Tesimony of Charles Sweeny.)

Q. That day he came to your office?

A. Yes, sir.

Q. How long did he stay there?

A. I don't know how long he waited outside. He was sitting down there when I came out.

Q. That was in the office of Clark & Sweeny?

A. Yes, sir.

Q. You had a private office there, and Mr. F. Lewis Clark had a private office there also?

A. Yes, it could be made private. Mr. Clark's office generally connected with the outside office.

Q. Patrick Clark was sitting out in your waiting room? A. No, he was in Mr. Clark's office.

Q. He was in F. Lewis Clark's office?

A. Yes, sir.

Q. And when you appeared upon the scene he spoke up and says, we have agreed upon a price?

A. No, sir.

Q. What did he say?

A. When I appeared upon the scene Mr. Clark was sitting outside in Mr. Lew Clark's office; and I says, "Hello, Patsy." He says, "Hello." Then Lew says, "Well, Clark wants to see you," and then we all went into my own office.

Q. Lew Clark was there, too? A. Yes, sir.

Q. Now, tell us who Lew Clark is. He was your partner at that time? A. Yes, sir.

Q. He is the same Lew Clark that was defendant in

(Tesimony of Charles Sweeny.)

the suit of Kennedy J. Hanley against Sweeny & Clark in the Skookum case? A. Yes, sir.

Q. The case that went to the Court of Appeals and was there decided? A. Yes, sir.

Q. The same Lew Clark?

A. Yes, sir. I would like to tell you about that case. I have a few remarks to make about that right now.

Q. Well, answer my question.

A. I will answer it. Yes, I am the same Charles Sweeny—

Q. Mentioned in that case?

A. Yes, I am the same Charles Sweeny referred to in the—

Q. What are you reading from?

A. A memorandum of my own.

Q. Who made it for you?

A. I did; nobody made it for me at all.

Q. We want it to go in evidence.

A. You can have it right here, in my writing.

Q. All right, put it in.

A. Yes, I am the Charles Sweeny referred to in the decision, and I want to say here, and I would like to have it go to the Court too, that the charges made in that case is a wanton lie, and without any foundation, and that such charges could have been conceived only by persons who are capable of planning and doing those things themselves. We bought and paid for that property, and only received what we bought, and have since

(Testimony of Charles Sweeny.)

discovered the property has no possible value except as a ranch.

Q. You want to put that in evidence, do you?

A. You can put it in evidence, if you want to.

Mr. STOLL.—Well, I will put it in evidence. And I want all this list of companies to go in too.

Mr. HEYBURN.—There is nothing goes in except what he read. If there is anything else on that paper it will be taken off.

Mr. STOLL.—I want the paper to be attached to the record.

Mr. HEYBURN.—What he read goes in, and nothing else.

(The paper offered is marked Plaintiff's Exhibit No. 38A.)

Q. Now, Mr. Sweeny, when the door closed upon the three thus closeted, tell us what occurred? You are quite sure that Lew Clark was there?

A. Yes, sir; I think so.

Q. Now, tell us what you said, and what Lew said?

A. I think Lewis was in there; he might have been in and out. He was there at the time.

Q. All right.

A. Well, all there was to it, I asked Mr. Clark if he had determined what price he would take for the Ella. Did not say anything about the Sheridan. He said, yes, they concluded that they would take \$4,000. I said that was all right. Then he referred to the Sheridan,

(Tesimony of Charles Sweeny.)

and he says I have a half interest in the Sheridan up there, and I would like to sell that too. I asked him what he wanted for it. He said \$3,000. I says, "All right, bring in the deeds and get your money." That is all there was to it.

Q. Where was Lew when this conversation occurred?

A. He was in and out of the office. He might have been in that office at the time, or outside, but he was in and out there.

Mr. HEYBURN.—Now, at this point, Judge Truitt, the Referee, having in his hands the paper from which Mr. Sweeny read his statement in regard to the Hanley case, I ask that that paper be curtailed to the statement that was read, and that nothing that was not read shall be left on it.

The REFEREE.—I do not know just what the authority of the examiner is. I do not know how much the witness read out of the paper.

Mr. HEYBURN.—The record will show that.

Mr. STOLL.—We put the paper in evidence, and the examiner, and nobody else, has the power to tear off or destroy any part of it. I will furnish you authorities on that proposition.

Mr. HEYBURN.—You will have a chance to furnish them to the Court.

Mr. STOLL.—We earnestly object and protest against that paper being tampered with in the slightest degree.

(Tesimony of Charles Sweeny.)

Mr. HEYBURN.—I would not think of asking the examiner to tear anything off. I care nothing about its visible presence on the paper. I intend the record shall show what was evidence on there; if there was a horse drawn on it, it would go with the paper in evidence, but it would not be a part of the evidence in the case.

Q. Mr. Sweeny, what interest have you in the Empire State-Idaho Mining & Development Company? How much stock do you own in it? A. Personally?

Q. I do not care whether personally or otherwise?

A. Myself and family own a million dollars' worth of stock, practically.

Q. What is the capitalization of that company?

A. Five million one hundred thousand dollars.

A. And you own one-fifth of it?

A. Yes. The capitalization is \$6,000,000, and \$5,100,000 issued.

Q. Do you own a fifth of it? A. About that.

Q. What did you own at the time of this transfer of the Empire State-Idaho stock? That is, did you own the same, or more? I mean at the time the Burke properties were transferred to the Empire State Company.

A. I had about one-tenth of the Buffalo Hump Mining Company, and I had about—well, I will give it to you exactly in figures presently.

Q. I don't care for that; just approximately.

A. I will give it exactly from the book.

Q. When will you get it for us?

(Testimony of Charles Sweeny.)

A. I will get it for you this afternoon; or I can get it in fifteen minutes by telephoning.

Q. All right, telephone for it. Now, Mr. Sweeny, in the affidavit that you filed in this case which lays before you, and to which you have heretofore stated you signed your name, and to which you have sworn, you used this language: "The quantity of ores that have been and are being extracted from said Ella and Missing Link claims can be ascertained by the measurement of the stopes from which said ores are being taken should it be desirable to do." Did you make that statement?

A. Yes, sir.

Q. Is that true?

A. The width of the ore to be estimated by that.

Q. Is that statement true?

A. But the stope might be a little bit wider than the ore, you know; if the ore is narrow they have got to take out so much ground anyway to get it.

Q. Is this statement in this affidavit true?

A. It is approximately, of course. All those things have to be figured out by an engineer, and the condition of the ore would be a question.

Q. That being the case, how are you going to get those conditions when the ore has all been taken out?

A. How do you mean, get those conditions?

Q. How are you going to get at it?

A. That would be a question of evidence.

Q. But your evidence, which you have put in here on your oath, is that the quantity of ores that have been

(Testimony of Charles Sweeny.)

extracted from the Ella and Missing Link claims can be ascertained by the measurement of the stopes?

A. Well, that is what they were doing at the time. If they want a measurement they can have it.

Q. Can that be done in the future?

A. Well, I think so; I don't think the stopes are filled up. I don't know; I have not been up there. It is a small vein; I don't think it is filled, but it might be.

Mr. STOLL.—At this time we want to put in evidence, as a part of the cross-examination of Mr. Sweeny, the affidavit which he swore to and which he now identifies as having been signed and sworn to by him, on the 13th day of September, 1901, and filed in this court on the 13th day of September, 1901, in this case.

Mr. HEYBURN.—That is objected to as incompetent, immaterial and irrelevant.

Mr. STOLL.—This being a part of the original files we will ask to withdraw it and put it in in rebuttal.

Mr. SWEENY.—How long have you known Albert Allen?

A. I have known Albert Allen since either the summer of 1883 or 1884; seventeen or eighteen years.

Q. Since the pioneer days of the Coeur d'Alenes?

A. Yes, sir.

Q. He was one of the first lawyers in there, and you was one of the first merchants and miners in there?

A. Yes, sir.

Q. You have known him ever since?

(Testimony of Charles Sweeny.)

A. Yes, sir.

Q. Have been friendly with him during those years?

A. Well, I don't think so. He got the Tyler case up against us. He has been a lawyer against us for years.

Q. Have you anything in your pocket that you want to read about the Tyler case at this time?

A. No, sir.

Q. Or with reference to Mr. Allen's connection with it?

A. No, sir. You ask me the question, and I will give you the answer.

Q. Are you on friendly terms with him now?

A. Well, I supposed I was.

Q. Have been for several years?

A. I never had any particular relations with him of any description, except to say how do you do, when I met him. I never had any business with him.

Q. Mr. Allen is a gentleman of good standing in the community, is he not?

A. I don't know his standing in the community.

Q. You have known him ever since 1883, and you don't know what his standing is?

A. I know I have not employed him in anything, and I have had a good many of them.

Q. You only employ the gilt-edged?

A. I try to employ the best I can get.

Q. The good are all in your employ, are they, Mr. Sweeny?

(Testimony of Charles Sweeny.)

A. No, sir, I try to employ the best I can get.

Q. Mr. Allen might be good and not be in your employ?

A. Yes, sir, but I just told you exactly what I thought of him.

Q. He is a lawyer that has been practicing at this bar?

A. Yes, sir.

Q. And has been practicing in Idaho a number of years?

A. Yes, he has been.

Q. Have you learned yet the amount of stock that you hold?

A. No, I will give it to you in writing.

Q. Very well. Now, Mr. Sweeny, on yesterday you made some changes in the Board of Trustees of the two different companies as stated before by you.

A. I told you that when I gave it before I gave it to you from memory, and I wanted to get it stated correctly.

Redirect Examination.

(By Mr. HEYBURN.)

Q. Mr. Sweeny, Mr. Stoll has made you say that the crosscut drift was started before Culbertson told you about the strike in the drill hole?

A. Well, I don't think I was there when the crosscut was started I was not there when the drill hole was started. The information I had about it was quite a long time after—personal information.

Q. Is it not a fact that the crosscut was started weeks after the drill hole was bored?

A. I don't know anything about that. I was not

(Testimony of Charles Sweeny.)

there at the time it was started. I was away in California when all that work was done.

Q. I hand the witness a memorandum that comes from the bookkeeper, (Handing to witness).

A. December 15, 1900, the date of the consolidation of the companies was along about January—December 15, which was the dividend date prior thereto, I had 18,538 shares of Empire State; that is, myself and family, I had 18,169 shares, personally.

Q. (Cross.) Ten dollars per share?

A. At par value of \$10, but it was worth about \$30. My daughter Gertrude has 369 shares on December 15, 1900, of Empire State stock. And I had about a tenth of the stock of the Buffalo Hump Mining Company.

(Witness excused.)

The WITNESS.—I desire to make the following corrections in my testimony. On page 428, second answer from the top, wherein I say that Packard and Callender went with me to the Buffalo Hump country, I was in error; it was at another time that they went, and on the occasion herein referred to it was James Parks and somebody else who accompanied me to the Hump country.

In my last answer on this page, where I stated that I had one-tenth of the Buffalo Hump stock, I should have said one-fifth, and at that time I had bought Mr. F. Lewis Clark's stock.

EDWARD S. WIARD, recalled on the part of defendants, testified as follows:

Direct Examination.

(By Mr. HEYBURN.)

Q. Mr. Wiard, have you taken any samples of ore and made some tests since you testified the last time?

A. Yes, sir.

Q. From where were the samples taken?

A. Two of them were taken in the bottom of the O'Neil stope, and two in the bottom of the Ella, and some of the samples were taken on the twelve hundred foot level.

Q. Commence with those in the O'Neil stope. You say they were taken by you? A. Yes, sir.

Q. State the manner in which they were taken and over how much ground and then give us the result.

A. The first sample—these were all taken on January 22d, and among the party was Mr. Miller and Mr. Cartwright. Sample No. 1 was on the 800 foot level ten feet east from a sample taken which was exhibited in court about the 5th or 6th of January. I have it marked here ten feet east from the sample of January 2d, that being the date we were in the mine before, in the bottom of the O'Neil stope, thirty inches of ore. The sample represents a width of thirty inches. It is in the solid and on the hanging wall side. There was a streak of high-grade ore about eight inches wide. This sample was taken ten feet west from the east end of the O'Neil stope, and the assays are 15.5 ounces of lead, and 6.7 ounces of silver.

(Testimony of Edward S. Wiard.)

Sample No. 2 from the 800 foot level, ten feet west from the sample of January 2, in the bottom of the O'Neil stope, representing thirty-six inches of ore. The sample was taken thirty feet west of the east end of the O'Neil stope. The assay is 11.1 per cent lead and five ounces of silver. Those two samples are from the O'Neil, and we have two from the Ella stope.

Q. Give us those now.

A. Sample No. 3 was ten feet east from the sample of January 2 in the Ella stope, taken in the solid formation, representing thirty inches of seams, and is a general sample and assays 9.7 per cent lead and 4.5 ounces of silver.

Sample No. 4 from the Ella stope, ten feet west from the sample of January 2, and assays 16.3 per cent lead and 6.6 ounces of silver. That was taken in the solid and is a general sample.

Those four are from the bottom of the Ella and O'Neil. Sample No. 6 was taken from the west edge of the twelve hundred crosscut at the intermediate drift, and is a sample taken parallel to the twelve crosscut in the intermediate drift for a distance of five feet along the width. And the assays are 7 per cent lead and 3.8 ounces of silver.

Sample No. 7 from the east edge of the twelve crosscut at the intermediate drift over six feet of width, a general sample from the solid, as is No. 6, and the assays are 6.1 per cent of lead and 3½ ounces of silver.

Sample No. 25, twelve crosscut at the intermediate

(Testimony of Edward S. Wiard.)

drift in the center of the track, over a width of about six feet, six inches wide in the solid, and a general sample as the other two are, and the assays are 1 per cent of lead and six-tenths of an ounce of silver. That is all I have any record of.

Cross-Examination.

(By Mr. STOLL.)

Q. Who selected the samples?

A. I took the samples.

Q. Who showed you the place to take them?

A. We proceeded from the one trench to the other that is marked out on the stopes there.

Q. You did not see the trenches made?

A. No, sir.

Q. Under whose direction were you acting?

A. Under Mr. Miller's direction.

Q. He took you to the place and told you to take a sample here? A. Yes, sir.

Q. And to take a sample there at the other place?

A. Yes.

Q. And you took those samples and made those assays? A. Yes, sir.

Q. How old are you Mr. Wiard?

A. I am twenty-six years old.

Q. Did you ever work in a mine? A. No, sir.

Q. What experience have you had in sampling ores?

A. I have had considerable experience at Wardner in sampling ore bodies there, either to determine their value

(Testimony of Edward S. Wiard.)

or to determine whether it would pay in some cases to drive various workings to work those ore bodies.

Q. How much of an experience have you?

A. I can't say as to that; I have done that kind of work.

Q. How many years?

A. During the whole time I have been with the company, three years.

Q. How long have you been with the company?

A. Three years.

Q. (Direct) You are a graduate of a school of technology are you not? Yes, sir.

Q. What do you mean by stating that you have had experience in sampling ores?

A. I have had experience in sampling ores.

Q. What experience have you had in sampling mines?

A. My experience in sampling mines is limited to my work in sampling mines at Wardner and Burke.

Q. How much experience have you had in those two places?

A. Three years. I have been with the company since my graduation.

Q. Have been engaged in sampling mines all the time?

A. No, sir, I am an assayer there at the mines, and occasionally I am sent to sample.

Q. How many times have you had occasion to sample in the mine? A. I could not say as to that.

Q. A dozen?

(Testimony of Edward S. Wiard.)

A. Yes, I have sampled more than that.

Q. Two dozen? A. More than that.

Q. Three dozen?

A. Well, it might be more than that. I have been off and on in the mines, I can't say exactly how often.

Q. About that many?

A. Probably it would be more than that.

Q. How many more?

A. I have probably taken fifty to one hundred samples in the mines.

Q. By that you mean you have gone into the mine and taken that many samples and assayed them?

A. I don't mean I have gone in there and simply picked up a sample and assayed it, but I mean sampled them for specific purposes to determine the value of ore bodies and things of that sort.

Q. Who took the samples on those occasions of which you have testified?

A. I took them or assisted in taking them.

Q. How big a sample did you take?

A. Probably five to ten pounds.

Q. Where is the remainder of your sample?

A. I had them at Wardner.

Q. How much of the pulp did you use? How much of the sample did you grind up and assay?

A. About three or four ounces.

Q. Over how wide a piece of ground did you take the sample?

(Testimony of Edward S. Wiard.)

A. Well, I stated in the evidence in each particular case.

Q. Well, state now.

A. On the twelve crosscut it was five or six feet, and up in the upper stopes it represented thirty to thirty-six inches of ore.

Q. Was it ledge matter or country rock?

A. It was in a solid ledge matter.

Q. Now, up in the Clark stopes, didn't you pick those samples? A. Pick them?

Q. Yes, in the Ella.

A. We took a general sample, an average sample clear across.

(Witness excused.)

W. GUS. SMITH, recalled on the part of the defendants, testified as follows:

Direct Examination.

(By Mr. HEYBURN.)

Q. Mr. Smith, have you made a map correctly representing the size of the openings in the stopes and the size of the ore in those openings in the property in controversy in cross-sections? A. Yes.

Q. Will you produce the map?

A. It is rather a long one (producing the map).

Q. You need not show it all. State if that map correctly shows the size of the stopes and cross-sections, and state where the cross-sections are in relation to the plan. Are they as shown by the dotted lines?

(Testimony of W. Gus Smith.)

A. It does. First we have the plan of the lower levels from the eight hundred down that are in the Ella ground, excepting a small portion in the sixteen.

Q. What is the scale?

A. Ten feet to one inch.

Q. Now, state what else is below there.

A. First we have the cross-section along the line that is produced through the territory which it is purported to be a cross-section of. That is on what is known as the south crosscut, or the crosscut running south on the twelve hundred level.

Q. Now, what is that section of; down to what point?

A. Down to the fifteen hundred foot level, beginning with the eight hundred foot level, and running down through the eleven hundred No. 3 stope to the eleven hundred foot level, then down through the twelve hundred foot or the stope from the twelve hundred foot level, which at that point reaches nearly to the eleven hundred foot level; and it shows the levels below there outlined in their positions as they are cut across; but there is no connection between them.

Q. That is there are no stopes?

A. There are no stopes at that point. The second section is along the dotted line, as indicated crossing the plan, beginning above the eight hundred foot level, in what we have termed the Ella stope near the center of the Ella lode, and shows the Ella stope, the eight hundred foot level, the eleven hundred No. 3 stope. I believe I said this was the eleven hundred No. 3 stope, but

(Testimony of W. Gus Smith.)

this is the No. 2, the first one. This is the number 3 and also the last one. But this shows the width of the ore in each case, and on each of these sections is outlined in red where it was actually measured at different times by myself or by the foreman of the mine. On the first section we began at the eight hundred foot level, or, rather, began on the nineteenth floor of the No. 2 eight hundred stope, and from that ran it into the raise on the eight hundred foot level where measurements are taken.

Q. Wherever the ledge is shown in red it is from actual measurements of the thickness of the ore?

A. On the cross-sections.

Q. Where it is shown by the dotted line, what does it indicate?

A. That indicates the width as shown by the testimony of different parties where they were not actually measured on the floor.

Q. That is, you got them from the foreman of the mine, did you?

A. Yes, sir, and from the testimony that has been given heretofore by different persons that had seen the ore stoped out.

Q. Just as soon as this question arose, then they began to measure at the mine? A. Yes.

Q. And since that time they have kept the measurements? A. Kept measurements.

Q. (Cross.) What is the width of the ore body there, that red streak? A. At this point?

Q. Yes.

(Testimony of W. Gus Smith.)

A. At that point it is thirty-six inches. At the next floor above it is twelve inches. The width and the date at which they were measured is down on each floor here on each cross-section.

Q. These figures represent the width of ledge and the date at which they were measured? A. Yes, sir.

Q. And where they are not actually measured, that is to say, the stopes before the measurements began, the figures represent the width of the ledge at that floor?

A. There are no figures given where the ledge was not actually measured, but simply outlined it with a dotted line. On the floor of the eleven hundred foot level it is accessible to the roof of the stope immediately under it, but the width is not given in the figures.

Q. This map is correctly drawn to a scale, is it?

A. To a scale of ten feet to one inch, on a large scale so as to be able to show the narrow ore bodies as they actually existed.

Mr. HEYBURN.—We offer this map in evidence.

Mr. STOLL.—We object to it because it was not made from actual measurements, at least not all of it. A portion of it is made from hearsay testimony of other persons given to this witness, upon which he bases his estimate and measurements and calculations; and therefore it is incompetent, irrelevant and immaterial.

Q. State if the plan is made from an actual survey by you? A. It is.

Q. State if the width of the stopes is made from actual measurements by you? A. It is.

(Testimony of W. Gus Smith.)

Q. The only thing that is not from actual survey are the dotted lines indicating the width of ore in the stopes before the period when the measurements commenced. Is that it? A. Where they are not colored.

Q. Outside of that the map is all made from actual measurements? A. Yes, sir.

Mr. HEYBURN.—We offer the map in evidence.

Q. (By Mr. WOODS.) I understood those red lines were from your measurements, and partly from reports by the shift-boss and foreman to you?

A. They were; nearly all of those are reports made to me by the foreman.

Mr. STOLL.—That is what we object to, and we renew the objection, and for the reasons before stated.

The WITNESS.—Some of them in the floors of the eight hundred foot level and the stopes above the eight hundred foot level, known as the O'Neil and Ella stopes, and on the twelve hundred foot level stope and the eleven hundred foot level floor in the first section here were all measured by me.

(Said map is marked Defendants' Exhibit No. 14.)

(Witness excused.)

CHARLES K. CARTWRIGHT, recalled on the part of defendants, testified as follows:

Direct Examination.

(By Mr. HEYBURN.)

Q. Mr. Cartwright, you were foreman of the mine?

(Testimony of Charles K. Cartwright.)

A. Yes.

Q. You took notes and observations of the width of the ore in the stopes, did you? A. Yes, sir.

Q. You have been a foreman during all the time since the work indicated by red on these maps was done, have you?

A. Nearly all the time. I think it was started just before I got there.

Q. How far up?

A. I think the work of taking measurements was probably started before I got there, just shortly before I started to work.

Q. Did you give Mr. Smith measurements taken from direct observation and measurements by you as to the width of the ledge? A. Yes, sir.

Q. From which this was put on this map?

A. Yes, sir.

(Witness excused.)

W. GUS SMITH, recalled on part of defendants, testified as follows:

Direct Examination.

(By Mr. HEYBURN.)

Q. Mr. Smith, is Mr. Cartwright the foreman who gave you the data from which you put this on the map?

A. Yes, sir, he is.

(Witness excused.)

Whereupon, an adjournment was taken until to-morrow morning, January 31, 1902, at 10 o'clock.

F. LEWIS CLARK, recalled on behalf of defendants:
(By Mr. HEYBURN.)

Q. Mr. Clark do you remember the occasion on which Mr. Patrick Clark came to your office on the 13th of October, 1899, in connection with the sale of the Ella and Missing Link claims to the Buffalo Hump Mining Company?
A. Yes, sir.

Q. State the circumstances as you remember them. First, did you hear Mr. Sweeny testify as to the circumstances this morning?
A. No, sir.

Q. That was before you came in?
A. Yes.

Q. All right. Just state them as you remember them.

A. I remember that Mr. Clark came in, I think, to the general offices and talked to me a little to begin with, but we did not talk anything in particular, and then we went into Mr. Sweeny's office, and talked about the weather and one thing and another for a minute, and then Mr. Sweeny said, "Well, Patsy, what do you want for that Ella ground up there?" And Mr. Clark said, "Well, if it is worth anything I guess it is worth \$4,000." We almost immediately said, "Well, all right; that's all right," and we closed the trade then and there, and there was no discussion.

Q. Was anything said about the mine or its developments or the value of it one way or the other?

A. There was no discussion at all about the property. We talked about the weather, and then this little talk came in, and then we began to talk about the weather again, or some indifferent subject, I don't remember.

(Testimony of Charles K. Cartwright.)

A. Yes.

Q. You took notes and observations of the width of the ore in the stopes, did you? A. Yes, sir.

Q. You have been a foreman during all the time since the work indicated by red on these maps was done, have you?

A. Nearly all the time. I think it was started just before I got there.

Q. How far up?

A. I think the work of taking measurements was probably started before I got there, just shortly before I started to work.

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Q. From which this was put on this map?

A. Yes, sir.

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Q. State the circumstances as you remember them. First, did you hear Mr. Sweeny testify as to the circumstances this morning? A. No, sir.

Q. That was before you came in? A. Yes.

Q. All right. Just state them as you remember them.

A. I remember that Mr. Clark came in, I think, to the general offices and talked to me a little to begin with, but we did not talk anything in particular, and then we went into Mr. Sweeny's office, and talked about the weather and one thing and another for a minute, and then Mr. Sweeny said, "Well, Patsy, what do you want for that Ella ground up there?" And Mr. Clark said, "Well, if it is worth anything I guess it is worth \$4,000." We almost immediately said, "Well, all right; that's all right," and we closed the trade then and there, and there was no discussion.

Q. Was anything said about the mine or its developments or the value of it one way or the other?

A. There was no discussion at all about the property. We talked about the weather, and then this little talk came in, and then we began to talk about the weather again, or some indifferent subject, I don't remember.

(Testimony of F. Lewis Clark.)

Q. Did you remain in the room all the time during the time Mr. Patrick Clark was there?

A. I think I left when that conversation was through with, when that matter was through with. I remember that particular circumstance very plainly. I remember exactly where we were placed relatively in the room. But I think I went out shortly after that.

Q. Mr. Clark, Joseph MacDonald has testified in this case that you and Mr. Sweeny wanted him to take charge of all of your properties and employed him as consulting engineer. Is that true at any time?

A. I think I had it in mind a little, and about saying so to MacDonald, and talked to him about what he knew and one thing and another on various times and occasions. Mr. Sweeny usually had charge of those matters, and when I spoke to Mr. Sweeny about it he did not seem to have much confidence—

Mr. STOLL.—I object to the witness stating any conversation between Mr. Clark and Mr. Sweeny as being hearsay, and without the hearing of the plaintiffs, and is self-serving declaration.

Q. Go on and finish your answer.

A. I was going to say Mr. Sweeny did not seem to favor the idea, told me that he thought MacDonald had always been his enemy, and nothing was done about it.

Mr. STOLL.—We move to strike the answer out for the reasons above stated.

Q. Did you ever employ him in any capacity whatever?

(Testimony of F. Lewis Clark.)

A. I think he was paid a commission or something in the nature of a commission, or he got something in the nature of a commission on the Tiger-Poorman stock deal, but he never was in our employ.

Q. Mr. Clark you testified once before in this matter in part on a former hearing. Have you looked over your testimony as it was transcribed in that case?

A. I saw something in the "Spokesman Review" the next morning that made me say to you that I wanted to correct my testimony in a minor point.

Q. Go ahead and state it.

A. It was to this effect: That I was asked by Mr. Stoll if I had discussed with you some part of the testimony, and I said that I had not; and I intended, in stating I'd not, to cover the particular line of evidence that was then being taken. Upon reading the paper the next day it appeared as if I had denied discussing the matter with you at all, which was not so, and which was not what I intended to deny.

Cross-Examination.

(By Mr. STOLL.)

Q. Did you know the matters and things of which you have testified this morning when you were on the stand before on January 7th? A. I think so, yes.

Q. Had you discussed those matters with Mr. Heyburn prior to that time?

Mr. HEYBURN.—What matters do you mean?

Mr. STOLL.—I am interrogating the witness.

(Testimony of F. Lewis Clark.)

Mr. HEYBURN.—I object to the question unless the attorney is willing to let the witness know what matters he means. He uses a general term.

Q. (The last question was read.) Do you understand the question?

A. Well, I have had a general discussion with Mr. Heyburn about this matter prior to the hearing of January 7th.

Q. About all your testimony?

A. But of the particular line you ask me about, and that I denied having talked about—

Q. No, no, about what you testified to here this morning. Have you discussed that with him?

A. I think I had spoken upon it, but I had not given my full statement. I don't think I said everything to Mr. Heyburn that I have said here.

Q. But he knew you were familiar with those facts in a general way?

Mr. HEYBURN.—Oh, yes, I state as an attorney that I knew it.

Q. Can you verify what your counsel states here as being true, Mr. Clark?

A. I have already said that I told him a large part of the testimony that I gave here this morning, but whether I told the whole of it to him I don't recollect.

Q. Isn't it a fact you were not prepared to testify there until you conferred with Mr. Charles Sweeny upon his arrival from New York?

(Testimony of F. Lewis Clark.)

A. I have not spoken to Mr. Sweeny except as you have seen me speak to him here for a month.

Q. Have not said a word about it?

A. No, sir, I just got in this morning on the O. R. & N. at half-past nine, or whatever time it was.

Q. Where have you been? A. At Portland.

Q. Have you talked with Mr. Hepburn since the 7th of January about your testimony that you were to give here to-day?

A. I told him the other day that I wanted to correct that testimony after I read the "Spokesman-Review."

Q. That is all you have talked to him about since then?

A. I have not finished my answer. I told him this morning in regard to the Clark sale there that that was my recollection of it, that it was in the office in my presence.

Q. Was Mr. Sweeny present when you told him that?

A. No, sir.

Q. Where was Mr. Sweeny?

A. I presume he was here.

Q. Where were you? A. I was out in the hall.

Mr. HEYBURN.—Let the record show that I say I went out to confer with him myself in regard to his testimony, which I had a right to do.

Q. Now, Mr. Clark, this conversation which you have testified about this morning with Mr. Patrick Clark and Mr. Charles Sweeny at the offices of Clark & Sweeny in the city of Spokane on the 13th day of October, 1899?

(Testimony of F. Lewis Clark.)

A. Well, it is about that date.

Q. Is that the place; did I state the right place?

A. I don't remember whether we called them the Clark & Sweeny offices or the Empire State offices.

Q. We will not be so technical. They were the offices you and Mr. Sweeny occupied? A. Yes, sir.

Q. And they were partly in your private room and partly in Mr. Sweeny's private room?

A. The conversation that I told about was in Mr. Sweeny's private room.

Q. Was the door closed?

A. I think it was.

Q. Was the door closed to your room?

A. I think so.

Q. Now, then, that was two years last October, was it not? A. Yes.

Q. Did you make any note or memorandum of what occurred there so as to charge your memory with it?

A. I did not, but when I first heard about the case this summer, I was away down east, and I recollected that fact, and I saw some of Mr. Clark's testimony.

Q. That was the first thing that struck you?

A. The first thing that struck me was the incorrectness of Mr. Clark's testimony concerning that matter.

Q. But you said a moment ago that you remembered where you three were sitting? The relative positions of the three parties in the room? A. Yes, sir.

Q. Describe that; tell us where they were.

(Testimony of F. Lewis Clark.)

A. Mr. Patrick Clark was sitting on the south side of the room.

Q. Did he sit up? A. What?

Q. When you went into Sweeny's room, did he sit down?

A. I don't remember whether he sat down instantaneously or not, but he was sitting down when this conversation took place, on the south side of the room. Mr. Sweeny was sitting at his desk and I was sitting back by my door, by the door that led into the room. I don't know why it is fixed so clearly in my mind.

Q. Was the door closed between your room and Sweeny's room? A. Yes, sir.

Q. Windows open?

A. I can't say whether they were open or not.

Q. You can't remember that. You only remember the position the three men were sitting in?

A. Yes.

Q. And you remember that although two years have elapsed, and nothing appeared to impress it upon your mind at that time?

A. Well, I first recollected it last summer or last spring some time when his testimony first became public, or some of it.

Q. Have you talked to Charlie Sweeny about what occurred in that room since that?

A. I think I did tell him that that was my recollection of it.

Q. When did you tell him that?

(Testimony of F. Lewis Clark.)

A. Some time this fall, I think, when I saw him here.

Q. Did he remember it too, when you told him about it?

A. He did not state. He simply seemed to acquiesce in what I said about it.

Q. You did not have any particular trouble about agreeing upon the facts, however?

A. I don't think we endeavored to agree especially.

Q. In that conversation, Mr. Clark did you or did Mr. Charles Sweeny make any statement to Patrick Clark about the work that you did in drilling in the Ella Mining Claim? A. No, sir.

Q. Did you or Mr. Sweeny state to Mr. Clark that you had penetrated the Ella ledge with a diamond drill?

A. I have already said there wasn't anything said about it.

Q. Just answer my question. A. No, sir.

Q. Did you or Mr. Sweeny state to Mr. Clark there that you had followed up the diamond drill with a crosscut? A. No, sir.

Q. And had found a body of ore on the fault of the vein? Nothing of that kind was said?

A. No, sir.

Q. In fact, no other or further words were spoken than those you have stated here?

A. That is right.

Q. No information was given whatsoever as to the workings of the Poorman—at depth or of the drift through the Ella, or of the development of the O'Neil?

(Testimony of F. Lewis Clark.)

A. No, sir.

Q. You discussed the weather. Do you remember that particularly?

A. Oh, I remember that we discussed some subject, just as any one would.

Q. What was there about the weather or what occurred then or what has occurred since to refresh your memory as to the discussion of the weather?

A. Well, when I say that we discussed the weather I mean that we discussed some other subject.

Redirect Examination.

(By Mr. HEYBURN.)

Q. Mr. Clark, have you any interest, directly or indirectly in the result of this case? A. No, sir.

Q. You have no interest in the property or in the companies? A. No, sir.

Recross-Examination.

(By Mr. STOLL.)

Q. You were a stockholder when this suit was brought. I mean when these matters occurred?

Mr. HEYBURN.—Which do you mean? When the suit was brought?

Q. Do you understand the question?

A. Not altogether, no, sir.

Q. Well, you have testified to certain matters here this morning, Mr. Clark. For instance, you said you went into the other room and discussed the weather and then talked to Patrick Clark and heard this and that and

(Testimony of F. Lewis Clark.)

the other thing. Now, at that particular time, you understand the time, do you? A. Yes.

Q. Were you a stockholder in the Empire State-Idaho Mining & Developing Company, and also in the Buffalo Hump Company, defendants in this suit?

A. Yes, sir.

Q. You were treasurer of the company at that time, the Buffalo Hump? A. Yes, sir.

Q. And you were a stockholder equally with Mr. Charles Sweeny? A. Approximately so.

Q. Are you the treasurer of either of those companies now? A. No sir.

Q. Have not been? A. Have not been recently?

Q. You sold your holdings there to Mr. Sweeny, didn't you? A. Yes.

Q. In which Mr. Sweeny traded you other property that was made out of those ventures?

Mr. HEYBURN.—You do not have to tell what you got for the property, Mr. Clark.

Mr. STOLL.—I will insist on the question.

A. The question is not a very comprehensive one.

Q. I will explain it if you don't understand it. You and Mr. Sweeny made some money out of the Empire State-Idaho Mining & Developing Company and companies that you had precedent to the organization of that company. You also made some money and acquired some property through the promotion of the Buffalo Hump Company. You drew some dividends and sold certain stocks. Am I stating the facts correctly?

(Testimony of F. Lewis Clark.)

Mr. HEYBURN.—You need not make any replies in regard to what you got for your property or how you sold it unless you want to.

A. Well, you stated correctly that we made some money out of those various undertakings.

Q. The money that was made out of those undertakings was invested in Spokane real estate, was it not?

A. We made money out of those undertakings, and out of various undertakings, and the money we made we invested in anything that we invested in.

Q. Those real estate investments in Spokane were given to you as your share of the division, and Mr. Sweeny had these stocks in the Buffalo Hump and Empire State. That is the way you divided up, was it not?

A. I sold out my interest to Mr. Sweeny, and he paid me various considerations for what he bought from me.

Q. He traded you property in Spokane for most of it, did he not? A. He paid in property, partly.

Q. Property that you owned in partnership?

A. I don't know that we joined in a partnership.

Q. Owned it jointly? A. Owned it jointly.

Q. Had you earned it in partnership, acquired it in partnership?

A. I don't remember whether we paid for it all out of money that we made in partnership, or out of money that we had before we were in partnership. Some of it was bought one way, and some of it was bought another way.

(Witness excused.)

F. R. CULBERTSON, recalled on part of defendants, testified as follows:

Direct Examination.

(By Mr. HEYBURN.)

Q. Joseph McDonald testifies that you declined on several occasions to go down the shaft of the Tiger-Poor-man mine because you said that you were afraid of the engineer, the hoisting engineer. Was there any truth in that statement?

A. There is absolutely no truth in it. I never made any such statements to Joe MacDonald.

Q. How long were you managing the mines at Burke?

A. Fifteen or sixteen years.

Q. State whether or not you frequently and freely went up and down the shaft and through the works.

A. Whenever I had any occasion to. Very frequently went up and down the works and through the shaft.

Q. Mr. Culbertson, yesterday you heard the diamond drill man testify that he delivered those cores to you when he brought them to the surface. You may state whether or not Joseph MacDonald saw or had access to those cores after they came into your possession.

A. He never saw them.

Q. Or had access to them?

A. Nor had access to them. I am speaking now of the cores of the drillings. There were several cores in the office that were entirely out of waste. He might have seen them or anybody else that happened to be in the office.

(Testimony of F. R. Culbertson.)

Q. No ore in them?

A. There was no ore in them at all. It was simply pure, clean waste.

Cross-Examination.

(By Mr. STOLL.)

Q. Who had access to these drilling cores?

A. They were in my charge.

Q. Who had access to them besides yourself?

A. No one.

Q. Who did you show them to?

A. My impression is that I had them assayed and that that was the end of it.

Q. Did Mr. Sweeny have access to them?

A. Mr. Sweeny was not there.

Q. Well, ever afterwards?

A. I can't say whether Mr. Sweeny ever saw them or not.

Q. Will you say that he did not?

A. Yes, I can state that he did not. Come to think about the matter I can state that he asked me what I had done with them, and I told him I had had them assayed and thrown them away, and he wanted to know if I had had them checked up, and why I had not had them checked up.

Q. What did you say in response to that?

A. I stated to him that I was familiar enough with the ore to be able to tell about what it would run without having any assay of it; that I was satisfied about what the ore ran, from my familiarity with the ore.

(Testimony of F. R. Culbertson.)

Q. When did that conversation occur?

A. That occurred on Mr. Sweeny's arrival from Frisco, in August.

Q. Whereabouts in your office did you keep those drill cores? A. Kept them in the back office.

Q. In the safe?

A. No, they were put in a cupboard.

Q. Who had access to that cupboard?

A. No one but myself.

Q. You did not allow anybody else to have access to it except yourself, did you?

A. Well, that was a private cupboard of my own.

Q. Was it locked, put a key on it?

A. Yes, sir; always had been locked.

Q. What are those cores like that came out of there?

A. What were they like?

Q. Yes.

A. They were very much broken up; some of them half an inch, an inch, and an inch and a half long.

Q. You can tell from the character of the ore or of the core, the quality of the ore that had been penetrated in the ledge, could you not?

A. I could form a reasonable estimate of it.

Q. Sufficiently so that you did not need to have it assayed? A. Oh, I had it assayed.

Q. But you say you could have done so without having it assayed?

A. The object in assaying it was more to determine

(Testimony of F. R. Culbertson.)

the ratio of silver to the per cent of lead than anything else.

(Excused.)

W. CLAYTON MILLER, recalled on part of defendants, testified as follows:

Direct Examination.

(By Mr. HEYBURN.)

Q. Mr. Miller, state whether or not you were underground in the Tiger-Poorman, or in that combination of mines before the purchase of the Tiger-Poorman by the Buffalo Hump Company, and for how long?

A. Not for six or eight months anyway, for the reason I had been tied up down in the Buffalo Hump country, and came out of the Buffalo Hump June 6th to Spokane. Came up here about June 7th or 8th. That was just prior to taking hold of the Tiger properties.

Q. You heard me read from Albert Allen's testimony that he said Sweeny told him you had made an examination of the mine and found a split vein and so on? Was there any truth in that statement that you did?

A. The first time I went underground was with Mr. Sweeny and Mr. Culbertson and somebody else, I don't recollect who it was, after the purchase, when Mr. Culbertson showed us the different faces.

Cross-Examination.

(By Mr. STOLL.)

Q. Mr. Miller, you made an affidavit in this case?

A. Yes, sir.

(Testimony of W. Clayton Miller.)

Q. Is that your signature; are you satisfied with that? A. Yes.

Q. I will call your attention to a portion of it: "That from the month of July, in the year 1899, to April, 1901, he was consulting engineer of the Tiger-Poorman mines, then owned and operated by the Buffalo Hump Mining Company, the defendant herein. That affiant was, during the year 1894, and until January 10th, 1895, acquainted with the mining claims mentioned in the complaint and called the Ella and Missing Link lode claim. That during all of said times he has been thoroughly conversant with the nature and character and extent of the development work upon said mining claims and all of them; the nature, character and value of the ores extracted therefrom, plans of operation and projected plans of operation of the said mining claims and property." Did you make that statement?

A. Yes, sir.

Q. Under oath? A. Yes, sir.

Q. (By Mr. HEYBURN.) Is it true?

A. Yes, sir; it is true.

(Witness excused.)

Mr. HEYBURN.—The record may now show a formal offer of all assays, samples of ores, maps, papers, etc., that have been used by the defendant's witnesses.

Mr. STOLL.—Here is a paper I would like to have opened and published by consent of counsel. It is a report of a commissioner at New York that he did nothing.

(Testimony of W. Clayton Miller.)

Mr. HEYBURN.—I object to having it published. It has nothing to do with the case.

Mr. STOLL.—At this time we object to the use of the testimony of Charles Sweeny, and move to strike it out, unless obedience is made to the order of Judge Beatty of this Court, by paying to the plaintiff's in this case the expense of going to New York to take Sweeny's testimony, the amount of which expense is \$1,500, which amount we now demand of you.

Mr. HEYBURN.—Let the record show that whenever the usual cost bill under the practice recognized in the courts is settled we will pay it. There has been no cost bill presented, no memorandum presented, no demand made. The Court made the order under which it should be settled, and when it is settled it will be paid like any other costs.

Defendants rest.

W. S. NORMAN, sworn on part of plaintiffs, testified as follows:

Direct Examination.

(By Mr. STOLL.)

Q. What is your business, Mr. Norman?

A. I am one of the proprietors of the Hotel Spokane.

Q. Were you the manager of the Hotel Spokane in the city of Spokane, in the State of Washington, during the month of October, 1899?

A. I was president of the company.

(Testimony of W. S. Norman.)

Q. Did you, during that period of time, keep a record of the arrival of guests? A. Yes, sir.

Q. Have you that record here? A. Yes, sir.

Q. Will you produce it, and turn to the arrival of Mr. Culbertson, on the 13th of October, 1899?

A. (After examining.) He did not arrive on the 13th of October. It was September.

Cross-Examination.

(By Mr. HEYBURN.)

Q. Your record does not show that Mr. Culbertson was at the Hotel Spokane on the 13th of October, does it? A. No, sir; it does not.

(Witness excused.)

Whereupon a recess was taken until 2 o'clock P. M., this 31st day of January, 1902.

Spokane, Washington, January 31, 1902, 2 o'clock P. M.

J. R. RIVERS, a witness sworn on behalf of plaintiffs, testified as follows:

Direct Examination.

(By Mr. STOLL.)

Q. What is your business?

A. Shorthand reporter.

Q. Did you report the case of John F. Forbis et al., Plaintiffs, vs. The Consolidated Tiger-Poorman Mining Company, The Buffalo Hump Mining Company, F. Lewis Clark, Charles Sweeny, W. B. Heyburn, L. A. Doherty, Bruce Clendenning, C. K. Edwards, and Willis Good-

(Testimony of J. R. Rivers.)

speed, Defendants, in the Circuit Court of the United States, for the District of Idaho, Northern Division?

A. I did.

Q. At that time did you take the testimony of Joseph MacDonald, a witness that was sworn upon that case?

A. Yes, sir.

Q. Did you afterwards transcribe his testimony?

A. I did.

Q. You may look at this, which is the original files, and state if that is a transcript made by you of his testimony which was filed in the case,

A. I recognize this transcript as being made by me.

Q. Is that a correct transcript of his testimony as given and taken in shorthand by you, and reduced to writing?

A. I will say, to the best of my knowledge and belief it is. It is my opinion that it is. Of course, I took this two years ago, and I have not had a chance to compare it with my notes.

Q. That was filed in the court as the official copy?

A. It was.

Q. Have you your notes?

A. I have the notes, but at the present time they are at Moscow, Idaho.

Q. How long will it take you to get them here?

A. I could get them here by three o'clock to-morrow afternoon.

Mr. STOLL.—We want to put Mr. MacDonald's testi-

(Testimony of J. R. Rivers.)

mony in evidence at this time in rebuttal, and if you insist on it, we will wait for the notes to come.

Mr. HEYBURN.—(After examining the transcript.) I will say this, that I will make no objection, because it is not the notes of the stenographer.

Mr. STOLL.—That is all right, then. Now, we will offer in evidence, at this time, in rebuttal, the following papers of portions of the record in the case of John S. Forbis, et al., Plaintiffs, vs. The Consolidated Tiger-Poorman Mining Company, the Buffalo Hump Mining Company, F. Lewis Clark, Charles Sweeny, W. B. Heyburn, L. A. Doherty, Bruce Clendenning, C. K. Edwards, and Willis Goodspeed, Defendants, tried or pending in the Circuit Court of the United States, for the District of Idaho, Ninth Circuit, Northern Division, to wit: The certificate of the examiner, Warren Truitt, dated 13th day of January, 1900, being the page which we now ask the examiner to have marked for identification Plaintiff's Exhibit No. 39; and also pages beginning at page 130, where the witness Joseph MacDonald appears to have been called as a witness for the plaintiffs in that case, and cross-examined by defendants' counsel, being the counsel for the defendants in this case, the Buffalo Hump Mining Company, continuing from page 130 to and including page 142, and we will ask the examiner to mark those pages for his identification as Plaintiff's Exhibit, No. 40, and we will take leave to substitute as a part of the record in this case copies of those pages which may be made under the direction of the examiner.

(Testimony of J. R. Rivers.)

The book from which these pages are offered was filed January 16, 1900, by A. L. Richardson, Clerk. The offer is made specially for the purpose of showing the cross-examination of Joseph MacDonald, and what was drawn from him at that time on such cross-examination by the counsel for the defendant in this case, the Buffalo Hump Mining Company. The certificate to the correctness of the testimony is certified by Judge Warren Truitt, Examiner, and bears date of the 19th of January, 1900.

Mr. HEYBURN.—We object to this offer of the testimony of Joseph MacDonald, as incompetent, irrelevant, and immaterial. We object to the certificate of the examiner as incompetent, irrelevant, and immaterial. It appears from the testimony offered, that Joseph MacDonald was a witness against the present defendants.

Cross-Examination.

(By Mr. HEYBURN.)

Q. MacDonald was called as a witness for the plaintiff's in that action, was he?

A. I have no personal recollection.

Q. Examine your record, please, and see.

A. (After examining the record.) Yes, that is right. He was a witness for the plaintiff.

Q. That is for Forbis, and against the present defendants, the Buffalo Hump Company.

(Said documents marked respectively Plaintiff's Exhibits Nos. 39 and 40, and copies to be substituted. The certificate of Judge Truitt conceded to be genuine.)

(Witness excused.)

Plaintiffs' Exhibit No. 39.

JOSEPH McDONALD, being first called and duly sworn as a witness on behalf of the plaintiff's, testified as follows:

Direct Examination.

(By Mr. STOLL.)

Q. Mr. McDonald, state your business, and place of residence?

A. Mine manager; residence, Gem.

Q. You know the defendants, Charles Sweeny and F. Lewis Clark? A. Yes, sir.

Q. What is the fact, Mr. McDonald, of your having had an option or a contract to purchase the stock owned by S. S. Glidden and F. R. Culbertson, in the Consolidated Tiger & Poorman Mining Company in June of 1899?

Mr. GRAVES.—I object as irrelevant and immaterial.

A. Well, now, I could not say whether it was in June or not, but I had such, I think.

Q. What was the date of the contract, if you remember?

Mr. GRAVES.—I object as not the best evidence.

A. I do not remember.

Q. What year was it in; what month?

Mr. GRAVES.—Same objection.

A. What will I do, answer it or not?

The EXAMINER.—Just as soon as Mr. Graves puts in his objection, go on and answer it.

A. Well, I could not say the month.

(Testimony of Joseph McDonald.)

Q. What year was it in?

A. I said last year, 1899.

Q. What portion of last year?

A. I think I got that some time in March. Now, if you want me to go on and explain the whole thing, how I got it, I could get at it, but this way of getting in the middle of it, it is hard for me to call up the dates, you know.

Q. That would not be material. What was the price that you were to pay for that stock?

Mr. GRAVES.—I object as irrelevant, immaterial, incompetent; not the best evidence. Contract shows for itself.

A. Well, the contract or the agreement we had before the—well, I do not know as it is necessary to say that. The agreement we had was, I was to pay—when I got the option, the agreement was I was to pay thirty-five cents a share for it, and then Culbertson was to get a commission of three cents a share for Glidden's stock, and also for any other stock he could secure for me. That was the agreement made before I examined the mine at all.

Mr. GRAVES.—I want to move to strike out the evidence, as irrelevant, immaterial, hearsay, and not the best evidence.

Q. Do you know where that contract is now, Mr. McDonald?

A. Why, I think Charley Sweeny has got it.

Q. What did you do with it?

(Testimony of Joseph McDonald.)

A. Well, now, that contract—let's see, the one that was between Glidden and I, I do not know where it is, but my report is what Sweeny got. I do not know what he done with the contract, because that was put in the bank. Never seen it after we signed it here. It was drawn up in your office and signed.

Q. What became of your interest in the contract, Mr. McDonald?

A. Why, I turned that over to Charley Sweeny.

Q. Did you receive anything for it?

Mr. GRAVES.—Objected to as irrelevant and immaterial.

A. Why, yes, I received something for it.

Q. What did you receive?

A. Well, now I could not tell you what I received for that alone, but I could tell you what I received for all I was to do for the parties and for this contract and other work I was to do for them.

Q. Answer the question; state what it was.

A. It was \$11,250.00; that is my recollection of it.

Q. Now state the conversation that occurred between you and Mr. Clark and Sweeny at the time you turned this contract over to them; state where it was.

A. It was—the conversation took place one evening.

Q. Well, go back before that; had you seen Sweeny on the train? A. Yes.

Q. Just state all of that conversation?

Mr. GRAVES.—I object as immaterial and irrelevant.

A. Mr. Sweeny was on the train with me, going up

(Testimony of Joseph McDonald.)

to the Coeur d'Alenes. We were talking over things in general, and I told him that I had examined and had a report on the Tiger & Poorman mine. He said, "Have they got anything up there?" I said, "Do you want to see it?" "I will show it to you," and I showed it to him. He looked it over. He asked me, "Will you let me have this, so I can look it over at my leisure?" I said, "Yes, you can have it as long as you want to," so he called me up over the 'phone one day, after that sometime—I do not know how long—asked me if I could not come down to Spokane, he wanted to talk to me. I told him all right—I wired him. When I got up town, the day I was coming down, I found a note at the hotel saying to come out to his house. So I went out to his house that evening. Mr. Clark was there, and Mr. Sweeny. The first thing regarding this that Sweeny said to me, he says, "Can't you break loose from that company you are with," he says, "and come with us?" he says, "I am getting busy." he says, "and I want to turn the management," he says, "of all that I have got over to you." I told him I could not possibly do that until the first of the year. "Well," he says—"now," he says, "if we bought this—

Q. Bought what?

A. If we bought this—referring to the Tiger & Poorman—he says, "We will make it an object for you, if you will come," he says, "you can live here in Spokane," he says, "and not be up in all that snow and bad country up in the Coeur d'Alenes"; he says, "You can live here in Spokane," he says, "like a white man."

(Testimony of Joseph McDonald.)

Well, I told him I realized that, but I did not see how I could get away before the first of the year; we had other matters on hand. "Well," says he, "If I make a deal, or buy this Tiger-Poorman, can you—" No, Clark says that—Clark says, "If we buy this Tiger & Poorman mine," says he, "would you act as consulting engineer, in the way of putting in machinery, and such changes as you mention in your report ought to be made," and I told him I could if it didn't take up too much time. Sweeny says, "I do not care if you do not go up more than once a week—give the outline of what you want, and what you know is the best machinery, and have it put in," and I says, "I could do that." He says to me, "Another thing—what do you want," he says, "for this report and option you hold on so much stock?"

Q. Stock in what?

A. Well, he did not say. I understood, of course, it was the Tiger & Poorman; you know that was what the conversation was about. "Why," I says, "I will leave that to yourself. I did not think I would realize anything out of it on account of the labor troubles; in fact, I says, "Mr. Campbell turned it down; I will leave it to yourself." He says, "How will \$12,500.00 do?" I says, "It is like finding it; I will take it; very glad to get it." So I was.

Q. Did they ever pay it?

A. No, never paid that.

Q. What did they pay?

A. They paid \$11,250.

(Testimony of Joseph McDonald.)

Q. When was this, if you remember?

A. Well, sir, I think it was in May, but I am not certain. I could tell you if I was at home.

Cross-Examination.

(By Mr. GRAVES.)

Q. Now, you said this \$11,250 was for other things, too; explain what it was all for?

A. In fact it was for getting this mine up in shape so they could work. The thing was run down so it was practically—well, it was no good, because they were running in debt all the time. I showed in my report the advantage of putting in the proper machinery, and the proper machinery in the mine and in the mill, so as to handle it, and I believed there could be a profit made on the mine by putting this in. I estimated an expenditure of \$125,000, to put the mine in shape to pay dividends.

Q. What did you do toward getting the mine in shape, what did you, yourself do?

A. Well, I went up there on several occasions. Sweeny took Culbertson up and he told Culbertson to take his book with him. Now he says, Joe. Culbertson has wore out a gross of pencils figuring, and he says, I want you to tell him what you want done here. Well, walked up to look to the gallows frame—

Mr. STOLL.—When was this Joe—just excuse me—before or after you turned your contract over?

A. After, I think—yes, it was after. I told them to raise the gallows frame some thirty feet higher. Ex-

(Testimony of Joseph McDonald.)

plained to them how they could do it. They claimed they could not, but we done it by using plank instead of great timber—plank was easier handled at greater height—makes just as strong work. Then we took the level at that height across to the mill, and I recommended putting in a large crusher 12 feet below that level so that the ore would have a general trend down the hill—stop this re-elevating they had there, conveying ore from the bottom of the mill back up again, and that would do away with several men. And also the changing of their jig machinery, which portion of it was running too fast, and did not give the ore time to settle on the beds of the jigs, and the changing of their trammels, that was running too fast and would carry the ore over and drop it down in place of sliding along the trammel and throw it right over, and the changing of the tables—of what we call the round tables, and vanners. Then the mine—that was, I think, all recommended on the surface. Then in the mine I recommended them, and furnished them the data and expense it would cost—recommended them to get a Reedler pump, made by Fraser & Chalmers of Chicago, to put down at their bottom level, and showed them the actual saving that that would give them over the present pumps they were using, taking the test made at the Helena & Frisco as a basis. Two pump men would run this Reedler, while there were 14 men engaged in running their old pumps. Now this is stating just part what was in the report, you know, too, and what I told them as we went along. Now that is all at that time that I done,

(Testimony of Joseph McDonald.)

for work at that time. About a week afterward I went up and got Culbertson to go East and purchase the pump and some electric machinery.

Q. Well, did you furnish them with directions as to the manner of putting in that machinery?

A. Yes, sir.

Q. Development of the mine?

A. Furnished them the men to do it with. Took them from my own crew. Sent our own superintendent up there, and also the master mechanic, because they did not have any one. Sweeny came down there; said he did not have a man that knew anything at all. He said he had to have them, and I just took these two best men I had and gave them to him to straighten them out, which they done. Got the mine dry inside of three days after they went up there, ready to go to work.

Q. Now, this \$11,250, that was paid you, was paid you for your report and for your services and for this option?

A. Yes, and other work that was to come up between that and—the time I would go over to them entirely, you know.

Q. Now you did not attach any separate value in the arrangement, to your option?

A. No, it was kind of a general thing, you know.

Q. You did not regard that as of any value, I understood you to say? A. No, sir, I did not.

Q. You just simply turned that in to them along with the report, the benefit of your examination of the mine and your directions? A. Yes, sir.

(Testimony of Joseph McDonald.)

Q. And assistance in the improvements necessary.

A. I did not make a price on anything. They made me this offer, if I did so and so—do this work for them. In fact, I am doing work for them right up to this date.

Q. For that same money?

A. Well, that is all I ever expect to get out of it.

Q. The developments and improvements in that mine that have been made up to the present time, since they took control of it, been under your advice and direction?

A. Yes.

Q. And in accordance with your recommendations?

A. It has.

Q. So that work and that machinery—

A. (Interrupting.) That is, it is partly done. They did not follow it out altogether, what I wanted. They did not get the machinery I wanted them to get; he found something cheaper, and went and bought it—Culbertson.

Q. That is to say, what they bought was not as expensive as you recommended? A. That is right.

Q. What you had recommended or did get, was it necessary to be gotten to put the mine on a working basis?

A. Yes, it was; they ought to have put in a whole lot better. They are going to have trouble there, just as sure as you are a foot high.

Q. Was that work necessary to preserve the mine?

A. Yes, without it the mine was absolutely worthless, except the surface improvements. The books showed they were way in debt.

(Testimony of Joseph McDonald.)

Mr. STOLL.—We object to this as not responsive to the question. The books will speak for themselves.

A. The books showed they were way in debt; oh, as high as eight and ten thousand dollars a month. There was a great deal of that due to old machinery and mismanagement together.

Q. You examined the books in connection with your option? A. Yes, sir.

Q. Was the mine paying—had it been paying at any time, according to your examination of the books?

A. Yes, it had; the books showed where it paid—

Mr. STOLL.—(Interrupting.) We object as improper cross-examination.

Q. Go on.

A. Yes, the books showed that it had a year or eighteen months before that paid some dividends.

Q. Which one was it?

A. Now I will take that back, when I say dividends; paid some back debts, do you see?

Q. Yes.

A. And they showed where there were one dividend paid, but Culbertson explained that and said—

Mr. STOLL.—Wait a minute; we object, this is getting out of all range of cross-examination. Nothing brought out in chief about this, one way or the other. Improper cross-examination.

Q. Go on.

(Testimony of Joseph McDonald.)

Mr. STOLL.—Irrelevant, immaterial, hearsay, and not the best evidence.

A. I came to a place in the books where there were \$4,000, I believe, paid in dividends, and I says to Culbertson, I says; how is this \$4,000 here; I thought, I said, you paid ten? Well, he said, we own sixty per cent of the stock, and he says, to stop those small stockholders from howling, he says, we paid them a dividend, but did not pay ourselves any—we had sixty per cent.

Q. The books showed four thousand actually paid?

A. Yes.

Q. Now what is the character of that mine as to being a deep mine and wet mine and so on?

A. It is down about 1,500 feet. Six months in the year, I think, they pump about 500 gallons of water a minute; three months, about 700; three months, about 1,100; that is in the wet—when the snow is going off.

Q. How is that 1,500 feet for the depth of a lead mine, as compared with other mines in the Coeur d'Alenes?

A. Now when I say that is 1,500; that is, 1,500 from the top of the shaft, but from the top of the hill where they slope, averages I think, about 2,200 on the dip of the ore, or the dip of the vein, you might put it more proper.

Q. Well is there any other deeper mine in the Coeur d'Alenes? A. No.

Q. Are there any other lead mines as deep in the United States? A. I do not know of any.

Q. You have had a good deal of experience in mining?

A. Yes been at it twenty-five years.

(Testimony of Joseph McDonald.)

Q. Good deal of experience in mining in the Coeur d'Alenes? A. Been there for eight years.

Q. Could the improvements that you recommended have been made for any less than the sum you have stated in your report, \$125,000?

Mr. STOLL.—I object to it as improper cross-examination.

A. No, they could not.

Q. Are you familiar with the improvements they have made there; the new machinery—the new work they have done? A. Yes, I am.

Q. Aside from criticism you have made that it has been too cheap—machinery has not been as good as it ought to be, has the work been done in a good and workmanlike manner? A. Oh, yes.

Mr. STOLL.—We object as improper cross-examination; incompetent, irrelevant, and immaterial.

Q. And good mining required that for the preservation, care and development of the mine? A. Yes.

Mr. STOLL.—I object to it as incompetent, irrelevant, immaterial; improper cross-examination.

Q. Was it possible to make that mine pay anything—to be operated at all at a profit, except by the expenditure of some such sum of money in making those improvements and developments?

Mr. STOLL.—I object as improper cross-examination; incompetent, irrelevant, and immaterial.

(Testimony of Joseph McDonald.)

A. No, sir, it was not possible for to make her pay expenses.

Redirect Examination.

(By Mr. STOLL.)

Q. Sweeny, he bought the mine on the strength of your report, didn't he, Mr. McDonald?

A. Well, sir, I am sure I could not tell you.

Q. Do you know whether he had any other report or not?

A. Oh, yes, he had three or four. He had some other fellows up there, I think; I heard about Clayton Miller being up there.

Q. Well, you recommended the purchase, didn't you?

A. Well, now, I do not know as I done that. I gave just the figures as I found them, and stated what would be necessary to do to put the mine on where it would pay some dividends.

Q. Where is your report?

A. Well, I think that there is a copy of it—I think Culbertson has got it, the maps and the report, and I think Sweeny has got some—got the maps, and I believe the report went to Culbertson. I know I gave him the maps and he came to me for another set; he says they took them away down from the office here in Spokane, and then after that I sent him some photographs of the maps.

Q. You gave a very complete report on it from start to finish, didn't you, to Mr. Sweeny?

A. Well, yes, I think it was.

(Testimony of Joseph McDonald.)

Q. That is the first notice he had of the condition of the mine—was your report and your conversation?

A. That, of course, I could not tell, what he had.

Q. You think so, don't you, from what occurred between you?

A. Well to say that was the first notice he had, of course, I could not tell that.

Q. Didn't you call his attention to the mine?

A. Yes.

Q. Your report, and show it to him?

A. Certainly I did.

Q. After he examined your reports and your maps, he telegraphed you to come to Spokane? A. Yes, sir.

Q. And then paid you this \$11,200 for that report and your other services and your option on that stock?

A. Not at that time.

Q. Was it afterward? A. Yes.

Q. And for other services on the mine? A. Yes.

Q. Now, how many trips did you make up to the mine there, to assist them?

A. I think I went up about once a week up to the first of the year, and sometimes twice.

Q. After what time?

A. Well, after Mr. Sweeny had bought it.

Q. Well, when was that?

A. Well, I suppose it was somewhere in May or June.

Q. Now, when was it that Culbertson went east to buy this machinery, do you remember?

(Testimony of Joseph McDonald.)

A. Right after I laid out the plans for them at the works that day; suppose about a week afterwards.

Q. In May or June; sometime along there?

A. Yes.

Q. When was it that Sweeny bought the stock from Glidden, with reference to the time that you made your first trip to the mine?

A. I could not tell you the date.

Q. Well, did you go to the mine for him, before he bought Glidden's stock, or afterwards?

A. Oh, it was—I suppose it was after, because—it was after that I went to the mine, was after; I suppose he had it bought, that I went.

Q. Now, what conversation did you have with Sweeny, if any, with reference to putting in this machinery at that time?

A. Well, the conversation had—I told him what was the proper machinery to put in.

Q. What did he say about doing so; did he say he was going to do it? A. Yes.

Q. And then sent Culbertson east, did he?

A. I presume so, yes.

Q. Well, he said so there, didn't he?

A. Yes—well, it was this way we discussed the matter whether to send him east or have the representatives of those machinery men come out to the Tiger mine.

Q. And he asked you what amount it would cost to put that machinery in at that time? A. Yes.

(Testimony of Joseph McDonald.)

Q. And you gave him the items? A. Yes.

Q. He approved of that and accepted your ideas of it, did he?

A. Well, I think he did, because he went to work and done it.

Q. And this was in May or early in June?

A. I believe it was. I could give you the dates, if I was at home.

Q. Well, you know—

A. (Interrupting.) It was right in that time, you know.

Q. It was before the first of July, anyway?

A. Oh, yes, I think so; I believe it was.

Q. Now who paid the men that you sent up; you sent a crew of men you say up there to help them out on different occasions, who paid those men?

A. Well, I suppose that Sweeny did. I didn't do it.

Q. It was not a part of your contract that you were—

A. (Interrupting.) To pay these men?

Q. Yes. A. Not much.

Recross-Examination.

(By Mr. GRAVES.)

Q. Well, did you go to work for Clark & Sweeny on the first of the year, and are you working for them now—for this company?

A. No, I did not go to work for them on the first of the year; in fact, I told them some time ago that I did not believe I could get away, because we had a lot of other

(Testimony of Joseph McDonald.)

options on a lot of mines all around there, we had to attend to, and I could not go; that was the long and the short of it. Things were so situated I could not leave where I was.

(Witness excused.)

State of Idaho, }
County of Latah. } ss.

I, Warren Truitt, examiner for the United States Circuit Court for the District of Idaho, Northern Division, do hereby certify that the foregoing testimony of the respective witnesses therein named, on behalf of the plaintiffs, was taken before me at the city of Spokane, State of Washington, at the dates named in connection with their testimony, by stipulation of the parties in said action; that before these witnesses testified they were each duly sworn by me to tell the truth, the whole truth, and nothing but the truth, and then the foregoing testimony of each witness, as named therein, was taken and written down in my presence, by J. L. Rivers, the stenographer agreed upon by the said parties, to report the same; that during the taking of said testimony, the plaintiff appeared by his attorneys, John O. Bender and Stoll & MacDonald, Esquires, and the defendants appeared, as noted in said testimony, by their respective attorneys, Messrs. Heyburn, Price, Heyburn & Doherty, for defendant. The Consolidated Tiger and Poorman Mining Company, and Messrs. Graves & Graves, for the Buffalo Hump Mining Company, and it was stipulated

before me by said attorneys for the respective parties as above named, that the testimony of all witnesses named therein, as noted and written out by the said stenographer, should be taken and accepted as the testimony of said witnesses, and reported to the Court by me as such without being signed by the witnesses, subject to such objections as appear thereto. And I further certify that the several exhibits which accompany said testimony were offered in evidence by the plaintiffs as noted therein. Dated this 13th day of January, 1900.

WARREN TRUITT,
Examiner.

J. G. WEBB, being duly sworn on behalf of plaintiffs, testified as follows:

Direct Examination.

(By Mr. STOLL.)

Q. What is your business, Mr. Webb?

A. Am in the real estate business.

Q. Do you keep, or were you connected with the management of the Review apartments during the summer and fall of 1899 in the city of Spokane?

A. I was.

Q. Did Mr. Culbertson stop with you during that summer? A. Occasionally, yes.

Q. Did you keep a record of his arrival and departure? A. I did.

Q. Have you a record showing whether or not he was with you in the month of August, beginning from the 20th on? A. I have.

(Testimony of J. G. Webb.)

Q. Please turn to it, if you have. Who made that record you have in your hand? A. I did.

Q. When did you make it?

A. I made this on Sunday evening, August 20, 1899.

Q. Do you know whether or not it correctly states the facts? A. I do.

Q. You know that of your own knowledge?

A. I do.

Q. The entry is in your handwriting is it, Mr. Webb?

A. Yes, sir.

Q. I will ask you, Mr. Webb, to read that entry that you have?

Mr. HEYBURN.—I want to cross-examine him before it is read.

Mr. STOLL.—After it is read, you may do so. I will ask him another question first.

Q. Mr. Webb, you may state when Mr. Culbertson arrived at your place and when he departed and how long he remained there, between the 20th and 25th of August? A. (Turning to the book.)

Mr. HEYBURN.—I object to the witness using the book for the purpose of answering.

Mr. GORDON.—He may use the book for the purpose of refreshing his memory on that point.

Q. You may answer the question, and in doing so use any memorandum you have.

Mr. HEYBURN.—I object to the witness referring to the memorandum which he is attempting to read from

(Testimony of J. G. Webb.)

to refresh his memory until I have had an opportunity to examine him as to that memorandum for the purpose of determining when it was made, by whom it was made, and its genuineness.

A. Mr. Culbertson came to our place on Sunday evening, August 20th, after dinner, and remained there until Thursday morning, the 24th day of August, I think it was, after breakfast. That is the entry I have, and that is the only way I know it.

Q. That was in the year 1899?

A. 1899, yes, sir. Of course, if I hadn't that entry I could not tell anything about it.

Q. Who made the entry?

A. I made the entry myself.

Q. Was it made at the time?

A. Yes, sir, I always made them when the—

Q. (Interrupting.) Does it correctly state the facts?

A. It does.

Cross-Examination.

(By Mr. HEYBURN.)

Q. I notice that the writing in your entry or memorandum has been made at two different times?

A. Yes.

Q. When was that entry made as to the time he left?

A. When he was leaving.

Q. Who was with him at that time?

A. Well, his family were all there. That is, Mrs. Culbertson and Libbie, and the nurse, and his sister I think was visiting him at that time. I think so. I have

(Testimony of J. G. Webb.)

got their entries when they arrived before he did, several days before he did.

Q. And you swear that he was there about the date of that book entry? Let me see what there is about it to indicate the date? As to the year what is there to indicate the date? You say this was in 1899?

A. Yes, sir; you will see, not at that entry, but two or three entries before, I have mentioned 1899, July, 1899; but just at that entry I did not put 1899; but it is 1899, for you will see before and after.

Q. And you made this entry at that time?

A. Yes, sir.

Q. You are just as positive you made this entry as to when he left, at the time?

A. Just as positive, yes, sir. You see, the reason I made that entry when he left, Mr. Heyburn, is this: Mr. Culbertson as a rule did not settle; it all went into a running account with the family, and the only way I would know how many days he was there when he went away was to make check on there; and then when the month was up—I never rendered any account until they were going away; and when the time came that Mrs. Culbertson was going away, of course I would refer to that book to see how many days Mr. Culbertson was with me.

Q. Is that your hotel register?

A. We had no hotel register.

Q. Well, that is the only one you had?

A. That is simply a memorandum.

(Testimony of J. G. Webb.)

Q. That was to you a register of arrivals and departures at your hotel?

A. Of the arrivals, yes. I put that down so as to see what I was charging them and what arrangement we had made and all.

Q. Have you any recollection as to whether he was there all of that time or went away and came back?

A. He was away all the time, out of the house, with the exception of his meals and nights. But he was not away from town outside. He was at home at night from the 20th to the 24th. He went away after breakfast on Thursday the 24th.

Q. That is the 24th is it?

A. Yes. It is entered there, the 24th, I think.

Q. I would like to know if that record shows the 24th and not the 26th?

Mr. STOLL.—You can put it in expressly that it is the 24th. We do not claim it was the 26th.

Q. (By Mr. CULBERTSON.) I went away on Thursday morning the 24th after breakfast.

A. Yes.

Mr. STOLL.—We will offer that entry in evidence.

Q. Have you any objection to putting the entire book in evidence, Mr. Webb?

Mr. HEYBURN.—There is no use of talking all that into the record.

Q. Well, just read the entry, Mr. Webb.

A. Well, as I have it, "Frank Culbertson arrived on

(Testimony of Charles S. Eltinge.)

letter shown you, Defendants' Exhibit No. 11, was not received by Mr. Clark?

A. I did not say it was not received by Mr. Clark.

Q. It might have been received by Mr. Clark?

A. Yes.

Q. And handed over to you for action?

A. It might have been, yes.

Q. Or Mr. Clark might have told you to have that deed made up and sent to Mr. Culbertson?

A. No, Mr. Clark did not tell me that.

Q. How did you come to send that deed to Mr. Culbertson?

A. I think Jim Clark gave me the deed to send to him.

Q. Do you know how Jim Clark came to do that?

A. No. I know there had been some talk in regard to it. Jim Clark had been spoken to about it by some one, and I got after him to get it, I think.

Q. Jim Clark was in Rosslund at that time, was he not?

A. I don't remember whether he was or not. No, I don't think he was, though he might have been.

Q. Where did Jim Clark execute the deed that you sent up?

A. It must have been in the office, I think.

Q. Have you any recollection on the subject?

A. Yes. I remember of his signing the deed.

Q. Mr. Eltinge, didn't you take this acknowledgment by telephone? A. No, sir.

(Testimony of Charles S. Eltinge.)

Q. Mr. Eltinge, when this deed was acknowledged you filled in Mrs. Culbertson's name at the request of Mr. Culbertson, didn't you?

(Objected to as immaterial.)

A. I could not tell until I see the deed.

Q. Did you have any other instructions as to the making of this deed than the instructions you have stated?

A. I think Mr. Culbertson spoke to me about getting a deed from Mr. Clark, and I spoke to Jim about it every time I saw him, and eventually it came in. That is all the recollection I have about it.

Q. You saw Mr. Culbertson spoke to you about getting the deed?

A. Mr. Culbertson spoke to me about getting the deed.

Q. Where?

A. Some time when he was in the office there.

Q. Where? Mr. Clark's office?

A. Oh, it might have been. I don't know whether it was there or in the bank. I remember Mr. Culbertson spoke to me about getting a deed from Jim.

Q. Fix that time, Mr. Eltinge.

A. I could not do it. It must have been some time previous to this date; it might have been just immediately previous, or two or three months.

Q. Have you any recollection on the subject at all?

A. That is to the best of my recollection.

Q. But have you any real recollection on the subject?

(Testimony of J. G. Webb.)

Sunday evening, August 20th, after dinner for a few days. Left on Thursday, August 24th, after breakfast."

(Witness Excused.)

CHARLES S. ELTINGE, sworn on behalf of complainants, testified as follows:

Direct Examination.

(By Mr. GORDON.)

Q. Mr. Eltinge, where do you reside and what is your present business?

A. I reside in Spokane. I am cashier of the Traders' National Bank.

Q. What was your business or employment during the summer and early fall of the year 1899?

A. I was clerk for Mr. Patrick Clark; that is, secretary.

Q. As such secretary to Mr. Clark what were your duties?

A. I had charge of all his business there in the office.

Q. Including correspondence?

A. Correspondence and everything of that kind that came up.

Q. Receipt and acknowledgment of letters?

A. Yes, sir.

Q. Handing to the witness Defendants' Exhibit No. 11, run over that, Mr. Eltinge, and I will state that it purports to be a press copy of an original. Having examined it, please state whether you recognize that as a copy of any letter ever received by Mr. Clark, or by you,

(Testimony of Charles S. Eltinge.)

as secretary, during the period of your employment as Mr. Clark's secretary?

A. I do not think I ever saw it before.

Q. I hand you Defendants' Exhibit No. 12. Is that your signature, Mr. Eltinge? A. Yes, sir.

Q. You may state whether or not that letter was written in response to the Exhibit No. 11, the press copy that your attention has just been directed to?

A. No, sir.

Q. How are you able to state that?

A. Because my recollection is that this letter was written at the request of Jim Clark.

Q. Referring to exhibit No. 12, your own letter?

A. Yes.

Q. Had that exhibit No. 12, been written in response to a letter received on that subject, is there any signification in the fact that it makes no mention of the receipt of the other letter?

A. Why, yes. If I had received the other letter I would undoubtedly have mentioned it in this, if this was in response to it. I would have said something about it.

Q. Handing you now Defendants' Exhibit No. 13, do you recognize that as a copy of any letter received by you while in the service of Mr. Clark as secretary?

A. I might have received that.

Cross-Examination.

(By Mr. HEYBURN.)

Q. Mr. Eltinge, how are you able to say that the first

(Testimony of Charles S. Eltinge.)

letter shown you, Defendants' Exhibit No. 11, was not received by Mr. Clark?

A. I did not say it was not received by Mr. Clark.

Q. It might have been received by Mr. Clark?

A. Yes.

Q. And handed over to you for action?

A. It might have been, yes.

Q. Or Mr. Clark might have told you to have that deed made up and sent to Mr. Culbertson?

A. No, Mr. Clark did not tell me that.

Q. How did you come to send that deed to Mr. Culbertson?

A. I think Jim Clark gave me the deed to send to him.

Q. Do you know how Jim Clark came to do that?

A. No. I know there had been some talk in regard to it. Jim Clark had been spoken to about it by some one, and I got after him to get it, I think.

Q. Jim Clark was in Rossland at that time, was he not?

A. I don't remember whether he was or not. No, I don't think he was, though he might have been.

Q. Where did Jim Clark execute the deed that you sent up?

A. It must have been in the office, I think.

Q. Have you any recollection on the subject?

A. Yes, I remember of his signing the deed.

Q. Mr. Eltinge, didn't you take this acknowledgment by telephone? A. No, sir.

(Testimony of Charles S. Eltinge.)

Q. Mr. Eltinge, when this deed was acknowledged you filled in Mrs. Culbertson's name at the request of Mr. Culbertson, didn't you?

(Objected to as immaterial.)

A. I could not tell until I see the deed.

Q. Did you have any other instructions as to the making of this deed than the instructions you have stated?

A. I think Mr. Culbertson spoke to me about getting a deed from Mr. Clark, and I spoke to Jim about it every time I saw him, and eventually it came in. That is all the recollection I have about it.

Q. You saw Mr. Culbertson spoke to you about getting the deed?

A. Mr. Culbertson spoke to me about getting the deed.

Q. Where?

A. Some time when he was in the office there.

Q. Where? Mr. Clark's office?

A. Oh, it might have been. I don't know whether it was there or in the bank. I remember Mr. Culbertson spoke to me about getting a deed from Jim.

Q. Fix that time, Mr. Eltinge.

A. I could not do it. It must have been some time previous to this date; it might have been just immediately previous, or two or three months.

Q. Have you any recollection on the subject at all?

A. That is to the best of my recollection.

Q. But have you any real recollection on the subject?

(Testimony of Charles S. Eltinge.)

A. I don't exactly understand your question.

Q. When I speak of real recollection, would you have any recollection on the subject if your mind was not refreshed by any conversation, memorandum or data? Have you any recollection because of the fact?

A. It is just a faint recollection I have that I was spoken to in regard to the deed, I think, by Mr. Culbertson.

Q. But you are not sure?

A. I am not sure; but I saw Mr. Culbertson quite often and I think he spoke to me about it and asked me to see Jim and get the deed, and so I spoke to Jim about it, and I think the next time he came into the office, about this time, he gave it to me.

Q. How are you able to remember that you or Mr. Clark did not get this exhibit No. 11 letter?

A. I do not remember ever seeing the letter before.

Q. Have you still got his correspondence that was received?

A. No, sir.

Q. What did you do with it?

A. I suppose it is in his office. I don't know.

Q. Did you open all of Mr. Clark's mail?

A. When he was absent I did, yes, sir.

Q. Was he absent at the time that letter, exhibit No. 11, would be received?

A. I do not know, I could not say.

Q. Where was Mr. Clark during the period from the 20th to the 25th of August, 1899?

A. I could not say.

(Testimony of Charles S. Eltinge.)

Q. Do you know whether he was in Spokane or not?

A. I do not.

Q. No recollection on that subject at all?

A. No.

Q. Could you refresh your memory by any memorandum or data of any kind?

A. I might be able to in some way; I don't know.

Q. Mr. Clark might have received that letter without your knowing it? A. Certainly.

Q. And he might, after receiving it, have told you to have him, Clark, make up a deed?

A. He might have done so, yes.

Q. You do not remember that he did not do so?

A. No, I do not remember that he did or did not, either one.

Q. Jim Clark was here in Spokane at that time, was he?

A. He must have been here the day I wrote this letter, yes.

Q. And you never received that letter acknowledging the receipt of the deeds?

A. I say I might have received that; undoubtedly did.

Redirect Examination.

(By Mr. GORDON.)

Q. That is exhibit No. 13 you now refer to?

A. Yes, exhibit No. 13.

Q. What was the practice or custom of the office during the period for which you were secretary for Mr.

(Testimony of Charles S. Eltinge.)

Clark as to preserving and keeping files of all letters received? A. They were generally kept.

Q. Files preserved?

A. They were while I was there, yes, sir.

Q. When did you cease there?

A. About two years ago, last September I think it was—September or October.

Q. I will ask you whether this letter, Defendants' Exhibit No. 12, which was written by you was written in response to the original of exhibit No. 11?

A. No, sir.

Q. Sir? A. No, sir.

Recross-Examination.

(By Mr. HEYBURN.)

Q. You are cashier of the 'Traders' National Bank, of this city? A. Yes.

Q. Mr. Clark is one of the directors of that bank, is he not? A. He is.

Q. You were secretary to Mr. Clark up to about two years ago, you say? A. Two years ago last fall.

Q. You went directly into the bank from his office?

A. Yes.

Q. About the time he became interested in the bank?

A. Shortly afterwards, yes.

Q. After you went into the bank did you have charge of his correspondence? A. No, I did not.

Q. Who took your place in his office?

A. I think a young man by the name of Jimmy Stewart was in there, but I am not certain.

(Testimony of Charles S. Eltinge.)

Q. Have you the letter-book in which the imprint of exhibit No. 12 was taken?

A. No, I have not the letter-book.

Q. Where is that letter-book?

A. I don't think there was any imprint of that taken at all, for the reason it was written at Jim Clark's request, and had nothing to do with the office at all.

Q. You have not charge of Mr. Clark's letter-book covering this period of September 7th, 1899, have you?

A. No, I have not charge of it.

Q. Have you it in your possession? A. No.

Q. Where is it?

A. I don't know. But I will say that letter was never copied.

Redirect Examination.

Q. When you wrote as secretary for Mr. Clark how would you sign?

A. I would sign Patrick Clark, By Eltinge.

Q. How is that letter signature?

A. Charles S. Eltinge. That letter was written for Jim Clarke. It had nothing to do with the office at all.

Q. Not for Patrick Clark?

A. It had nothing to do with the office at all.

(Witness excused.)

PATRICK CLARK, being recalled on behalf of complainants, testified as follows:

Direct Examination.

(By Mr. STOLL.)

Q. Mr. Clark, did you hear the testimony of Mr. Sweeny to the effect that in the early days of October, in front of the Exchange National Bank in Spokane, he had a conversation with you? A. Yes, sir.

Q. Did you have that conversation at that time or place, or at any time or place, or any conversation of that character or import with Mr. Sweeny?

A. Not at that time or place.

Q. Did you at any other time or place have that character of conversation?

A. I had a conversation with him in my office.

Q. Is that the conversation to which you testified in chief in this case when you were on the stand before?

A. Yes, sir.

Q. Did you hear the testimony of Mr. Sweeny and Mr. F. Lewis Clark to the effect that you went to their office in the Wolverton Block in this city, and entered Mr. Lew Clark's private office, and afterwards with him went into Mr. Sweeny's office and there had a conversation with Sweeny in the presence of both Sweeny and Lew Clark concerning the sale of the Ella Mineral Claim?

A. No such conversation ever took place.

Q. Were you at that office at that time?

A. I was there to hand the deed to Mr. Lewis Clark

(Testimony of Patrick Clark.)

for the ground in controversy, and the only time I ever was in their office.

Q. That was on the 20th of October, was it not?

A. Yes.

Q. You state that is the only time you were ever in their office? A. The only time.

Q. Did you see Charles Sweeny there at that time?

A. No.

Q. Did you have the conversation which they claim you had at Sweeny's office at any time or any place with them? A. Not with them.

Q. Did you ever have any other conversations with Sweeny concerning the purchase and sale of the Ella Mineral Claim excepting those of which you testified in your direct examination when you were on the stand before? A. No, sir.

Q. Did you ever have any conversation with Lew Clark at all in person or when he was present concerning the sale of the Ella?

A. I never had any conversation with Lew Clark only when I went in there to hand him the deed, as I stated in my examination before.

Q. Mr. Culbertson has testified (I believe you were present when he gave his testimony at San Francisco at the Palace Hotel) that on the 20th day of June, 1899, in the city of Spokane, on the street, he had a conversation with you in which you said to him, "I understand you have sold out your interest in the Tiger-Poorman. whereupon he replied, 'Yes, we have sold out,' or words to

(Testimony of Patrick Clark.)

that effect. Whereupon you said in effect, 'Well, it is about time to get out of that country and let some other fellows wrestle with those things. You have had enough of it, or words to that effect.'” Did you ever have that conversation with Mr. Culbertson?

A. No, never.

Q. Where were you on the 20th of June, 1899. Mr. Clark? A. I was at Atlantic City, New Jersey.

Q. What hotel were you staying at?

A. Brighton Hotel.

Q. Have you the register of that hotel here?

A. Yes, sir.

Q. Please turn to your arrival there at that time?

A. Monday, June 19. I registered there on June 19th, and left there on July 6th.

Q. Is this registration here of “P. Clark and Fam., Spokane, Wash.” in your handwriting?

A. Yes, sir.

Q. When was it made by you?

A. On the 19th of June, 1899.

Mr. STOLL.—We offer that entry in evidence, and we will also offer and have copied into the record all of the entries on that page.

Mr. HEYBURN.—That is objected to as immaterial and irrelevant.

(Said page of the register, containing the entry identified by the witness, together with all entries before and after it on said page, with headings of columns, were copied therefrom as follows:)

(Testimony of Patrick Clark.)

REGISTER.

HOTEL BRIGHTON, 1899.

Monday, June 19th.

	Bath	
Mr. and Mrs. George Flagg, Philadelphia.....	359	L
Miss Adelaide G. Flagg, Philadelphia.....	359	L
Master Paul M. Flagg, Philadelphia.....	360	
Master Geo. L. Flagg and Maid, Philadelphia.....	358	L
Charles W. Dunes (M. D.), Philadelphia.....	—	L
Charles W. Dunes, Jr., Philadelphia.....	—	L
Mrs. Preston Lea, Wilmington, Del.....	—	L
Mrs. Thrapps Maid, Philadelphia.....	354	D
Mrs. F. Percy Smith and Maid, Philadelphia.....	346	D
Miss Katharine Smith, Philadelphia.....	350	D
Miss Elizabeth Page, Philadelphia.....	349	D
Winthrop Percy Smith, Philadelphia.....	347	D
Mrs. James H. Sherman, Philadelphia.....	252	D
.....	101	
P. Clark and fam., Spokane, Wash.....	110	D
.....	165	
.....	166	D
Mrs. C. Waugh, Summit, N. J.....	230	D
Master Randall Waugh, Summit, N. J.....		
.....	230	D
Augustus G. Cobb.....	260	D
Geo. A. Shepard, New York.....	147	Ldg.
W. A. Miles, Washington, D. C.....	131	Ldg.
		Bath

(Testimony of Patrick Clark.)

Mr. and Mrs. Chas. Y. Andenried, Philadelphia. 226 Ldg.
 B. P. Barren, Tiffin, Ohio. 258 Ldg.
 Townsend Scott, Baltimore. 314 Ldg.

Q. Mr. Clark, where had you been prior to going to the Brighton Hotel, and when did you leave Spokane; just give us your whereabouts?

A. I cannot tell you the exact date that I left Spokane, but I arrived in Washington, D. C., on May 27th, and registered at the Arlington Hotel—

Q. What year?

A. 1899. I left there on June 2d, and registered on June 3, 1899, at the Touraine Hotel, Boston. I left there on June 9th, 1899, and registered at the Fifth Ave. Hotel, New York, June 10, 1899. I left New York on June 19, 1899, and registered at the Brighton Hotel, Atlantic City, New Jersey, June 19, 1899, the same date I left New York. I left there on July 6th, 1899, for home, via Buffalo, Great Lakes, Duluth, and thence via Northern Pacific through the Yellowstone Park, arriving home about the 22d of July, 1899.

Q. What do you mean by home?

A. Spokane.

Q. During your absence from Spokane on this trip did you see Culbertson? A. I never saw him.

Q. From what data or memorandum do you fix and determine your whereabouts during this period, Mr. Clark?

A. I went to the different hotels since I saw Mr.

(Testimony of Patrick Clark.)

Culbertson's affidavit, and ascertained the facts from the hotel registers.

Q. How did you ascertain the facts from those hotels? A. From the clerks in the hotels.

Q. Independent of that you have knowledge to that effect--- personal knowledge?

A. Yes, sir, I knew I was back there about that time, but I did not know the exact date within a few days.

Q. What day did you get back to Spokane?

A. About the 22d of July.

Q. Now, can you state positively of your own knowledge, Mr. Clark, that in the summer of 1899 between the 25th of May and the 22d of July, you were not in the city of Spokane or the State of Washington, or upon the Pacific coast, at all?

A. No, sir, I was not until I arrived on this side of the Rockies on my way home.

Q. I say, can you state positively of your own knowledge that you were not here at that time?

A. Yes, sir, absolutely so.

Q. Mr. Culbertson states as follows, in response to a question that was put to him (page 18) by Mr. Heyburn:

"Q. In what? A. In the Tiger and Poorman Company to Mr. Sweeny, which was along about the 20th of June--

Q. (Interrupting.) What year? A. 1899. I met Mr. Clark on the street in front of the bank--

Q. (Interrupting.) What bank? A. The old National Bank, in Spokane. He says to me, 'I see you have

(Testimony of Patrick Clark.)

finally sold out,' to which I made the remark, 'Yes, we have sold out'; that I had been up in that country a long time, and that I had had about enough of it, or words to that effect. Q. Did you have any reference at all to the sale or prospect of sale of any interest in the Ella or Missing Link claims or any other claims? A. That subject did not come up, had not been mentioned, and had not been thought of at that time. This conversation was called out owing to the fact of the "Spokesman Review" publishing the account of our sale to Mr. Sweeny." Did you have that conversation at that time or at any other time? A. No, sir.

Q. Now, Mr. Clark, there is a letter put in evidence here marked Defendants' Exhibit No. 11, purporting to be a press copy of a letter written to you August 25th by Frank R. Culbertson. You may examine that, and state if you ever received such a letter, or ever heard of such a letter prior to the time that Mr. Culbertson testified at San Francisco?

A. Is this a verbatim copy of the San Francisco copy?

Q. Yes, that is a copy; a carbon or typewritten copy was used in San Francisco.

A. (After examining exhibit No. 11.) I never received that letter.

Q. Did you ever see that letter, or the letter of which that purports to be a copy, at any time or at any place?

A. No.

Q. It never was received at your office so far as you know? A. So far as I know, never.

(Testimony of Patrick Clark.)

Q. Where were you on the 20th of August, or from the time you arrived here, say from the 22d of July, up until the 13th of October?

A. Oh, I was around town here.

Q. You were in Spokane, were you?

A. Yes, most of the time; I might have gone out to some point.

Q. How frequently, if at all, did you see Mr. Culbertson from that time on until the Ella was sold?

A. I never saw Mr. Culbertson that I can remember of but the once, when he came to my office.

Q. Mr. Clark, assuming that Mr. Culbertson was in Spokane from the 20th of August to the 24th, and that he desired to communicate with you or confer with you on the subject of the Ella and Missing Link claims, was there any reason why he could not have seen you either at your home or your office? A. None that I know of.

Q. You were here during that period?

A. I believe so.

Q. You were on the street every day?

A. Well, more or less.

Q. You live in Spokane, your home is here, and your family live here? A. Yes, sir.

Q. A letter has been put in evidence here, which is marked Defendants' Exhibit No. 12. What do you know about that letter?

A. I know nothing whatever about it.

Q. Have you examined your letters files to ascertain whether such a letter has ever occupied it?

(Testimony of Patrick Clark.)

A. Yes.

Q. Do you find it? A. No.

Q. Have you examined your files of letters received for the purpose of ascertaining whether such a letter as Defendants' Exhibit No. 11 has been received by any other person in your office?

A. Yes, we have searched for it since I came back from San Francisco, and we have not been able to find it.

Q. Another letter is put in evidence marked Defendants' Exhibit No. 13, dated September 9th, and addressed to Charles Eltinge. State what you know about the receipt of that letter, if such a letter was ever received.

A. Not that I know of. Eltinge might have received it, but I have not.

Cross-Examination.

(By Mr. HEYBURN.)

Q. Mr. Clark, do you say you are positive that letter in which Mr. Culbertson requested you to send him the deed was never received at your office? Were you at your office at that time?

A. I was there every day about that time.

Q. Were you there on the 25th, 26th, or 27th of August, 1899?

A. I believe I was there all of the month of August, every day.

Q. Who all were in your office at that time—what persons? A. Myself and Mr. Eltinge.

(Testimony of Patrick Clark.)

Q. No one else?

A. Mr. Kingsbury had a desk there, but was not here at the time.

Q. Where have you looked for the original of that letter?

A. I have looked among my letter files. If I had received a letter of the apparent importance of that, I believe it would be put away; but I have not been able to find it.

Q. Do you swear that letter, the original of that exhibit, never, was in your letter files?

A. Not that I know of.

Q. It might be there, and you not know of it?

A. I don't think it could, because we have searched very carefully.

Q. You testified, if I remember correctly, that you handed Mr. Culbertson this James Clark deed at your office, did you not?

A. Yes, sir.

Q. You were mistaken about that, were you?

A. Perhaps, so. I might have handed it to him, and perhaps it was not acknowledged, or something, and turned over to Eltinge to hunt Jim up and have it done. Perhaps that might have occurred. I know that is the way it occurred in my office at the time, just as I testified before.

Q. Was not that deed drawn at Burke?

A. No, sir.

Q. You swear to that?

A. Yes, sir.

Q. Wasn't it drawn at Burke, and wasn't the name of Mrs. Clark left blank, and you filled it in down here?

(Testimony of Patrick Clark.)

A. I don't remember as to that.

Q. Is not the name of Mrs. Clark in a different handwriting from the body of that deed?

A. I have not seen it.

Q. Have you any recollection of that deed, of the execution or making of it? A. No, sir.

Q. Do you swear the deed was made in Spokane?

A. Well, that is my recollection.

Q. On what do you base that recollection? Did you see the deed made?

A. Because it was executed here, I assume that it was made here.

Q. That is the only ground on which you assume it was made here? A. Yes, that is the only ground.

Q. You did not see the deed executed, did you?

A. No.

Q. Did you ever see the deed?

A. I don't know that I have, except when I handed it to Culbertson.

Q. Did you hand it to Culbertson?

A. I believe so, yes.

Q. You still believe it? A. Yes, I think so.

Q. Notwithstanding, Mr. Eltinge says he sent it to him at Burke?

A. That was later. I handed it to Mr. Culbertson along about the 22d, 23d, or 24th of August, somewhere along there, and I notice Mr. Eltinge says he sent it to to him on the 7th of the following month. There must

(Testimony of Patrick Clark.)

have been some delay on account of the acknowledgment, I presume; I don't know of anything else.

Q. Was the body of that deed written with a pen, or was it typewritten?

A. I could not tell you, sir; I don't remember.

Q. Did Mr. Culbertson write that deed?

A. I don't know.

Q. Why would you hand it to him if it was not executed? A. I don't know why I would.

Q. You don't know who made it out? A. No.

Q. Nor where it was made out? A. No, sir.

Q. Whether it was written with the pen or the typewriter? A. No, sir.

Q. Whether Mr. Culbertson wrote it or not?

A. No, sir.

Q. You still think you handed it to him?

A. I do.

Q. Had it been acknowledged when you handed it to him? A. It appears not.

Q. Can you account for having handed him a deed that had not been acknowledged? A. No.

Q. What date does the deed bear?

A. I don't know; I don't recollect just now.

Q. Was it dated when you handed it to Culbertson?

A. I suppose so; I don't know that it was.

Q. Are you willing to swear that it was?

A. I would not, no. Those are little matters I expected he would look out for.

Q. Why did you hand it to him? What was your

(Testimony of Patrick Clark.)

object in handing him a deed that was not dated, or signed, or acknowledged?

A. I do not know that it was, or that it was not. I did not say that it was, or was not.

Q. Will you fix the date on which you handed it to him? A. No, I am not positive.

Q. Fix it as nearly as you can.

A. About the 23d or the 22d.

Q. Might it have been later than the 23d?

A. I think not.

Q. You say it was either the 22d or 23d?

A. Somewhere along there.

Q. Of August, 1899? A. Yes.

Q. In your office? A. In my office, yes.

Q. In the city of Spokane? A. Yes, sir.

Q. And that is the deed signed by James Clark and wife?

A. I think so; I did not see it after that.

Q. That conveyed the interest to Mr. Culbertson?

A. I did not see it after that. There might have been a new one made out for all I know.

Q. How did it come into your possession?

A. I don't know.

Q. Where did you get that deed?

A. I don't know.

Q. Who requested you to deliver the deed to Mr. Culbertson? A. Mr. Culbertson, himself.

Q. At the time it was delivered?

A. About that time, yes.

(Testimony of Patrick Clark.)

Q. Was it that day? A. I don't remember.

Q. I would like to have you refresh your memory, and say whether or not you gave Culbertson the deed the day you say he requested it? A. I think I did.

Q. You don't remember where you got the deed?

A. No.

Q. Was James Clark here at that time?

A. He was.

Q. In the city of Spokane?

A. He was around here, yes.

Q. On the 22d or 23d of August?

A. I think he was. I don't know whether he was or not.

Q. On the 22d or 23d of August, 1899?

A. I think so.

Q. And he gave you that deed. Did you ask James Clark to make that deed?

A. At the request of Mr. Culbertson.

Q. And he made it the same day that you asked him?

A. I think so, or the day after, perhaps.

Q. Did you witness that deed? A. No, sir.

Q. Did you see it signed or executed? A. No.

Q. Mr. Eltinge was a notary public at that time in your office? A. Yes.

Q. What time of day did you give that deed to Culbertson? A. I don't know.

Q. Was it during the daytime?

A. I think so; yes.

Q. Who was present?

(Testimony of Patrick Clark.)

A. Nobody but Mr. Culbertson.

Q. Mr. Eltinge was not there?

A. No, sir; he was out in the other room.

Q. Did Mr. Eltinge hand you that deed?

A. Not that I know of.

Q. You don't know where you got it?

A. No, sir.

Q. Was James Clark in your office that day?

A. I don't know.

Q. You did not see the deed executed by any of the parties?

A. No, sir.

Q. It could not have been later than the 23d when you delivered it to him, could it?

A. No, I think not.

Q. You didn't notice the date of that deed?

A. No, I did not read it.

Q. Is it not a fact, Mr. Clark, that that deed was drawn at Burke and sent down here to be executed, with the name of Mrs. Clark left in blank, with the request that it be filled in, and that the letter that transmitted it was the letter that is in evidence here?

A. I stated before I did not know that it was, or when it was made out.

Q. If it was drawn at Burke on the 25th of August, then you would be mistaken about having handed it to Culbertson, would you not?

A. Yes, sir.

(Witness excused.)

Mr. STOLL.—We now offer in evidence the affidavit of Charles Sweeny, signed and sworn to by him on the

(Testimony of Patrick Clark.)

13th day of September, 1901, before A. L. Richardson, clerk, and filed September 13, 1901, in the suit entitled Patrick Clark, Benjamin C. Kingsbury, James Clark, and James P. Harvey, Complainants, vs. Buffalo Hump Mining Company et al., Defendants, in this court, and in this case, and we will ask leave to substitute a copy.

Mr. HEYBURN.—I shall object to the substitution of a copy because there is no consent here that that paper be withdrawn from the files. It is an original file in this court, in this case, and it was sent here for the purpose of the examiner, and not to be taken possession of by either litigant, and I do not think the examiner could properly, or would at all, allow it to be taken into the possession of either party. I object further, because it is immaterial, incompetent and irrelevant.

Mr. STOLL.—We offer the original paper. It is a part of the files of the case. We can always offer the files of a case in evidence. If there is objection to it on any technical ground, we will propose to substitute a copy.

The EXAMINER.—So far as the original files are concerned, they are in my possession as examiner, sent to me by the Clerk of the Court. I am responsible for them, but I suppose that that is a part of the files. I would not be willing to surrender these papers, and put them into the possession of either party.

Mr. STOLL.—They can be put in the possession of the stenographer to be copied.

(Testimony of Patrick Clark.)

The EXAMINER.—These original files having come to my possession from the clerk, I should want the record to show any disposition that is made of them, so that I would not be made responsible for any taking of them from the records, or anything of that kind; but the parties can use the record for the full purpose of making out their cases, and that is what the clerk put them in my possession for. Beyond that I have no control over them.

Mr. STOLL.—Do you refuse permission, Mr. Heyburn, of the stenographer to make a copy?

Mr. HEYBURN.—Oh, no; I do not object to his making a copy, but I want the original paper always to remain where we can get at it.

Mr. STOLL.—Very well; I would like to have the stenographer make a copy of that, and put it in the record.

(Said document was thereupon by the examiner given into the possession of the stenographer to make a copy thereof, which copy is as follows:)

*In the Circuit Court of the United States, for the District of
Idaho, Northern Division.*

PATRICK CLARK, BENJAMIN C.
KINGSBURY, JAMES CLARK, and
JAMES P. HARVEY,
Complainants,

vs.

BUFFALO HUMP MINING COM-
PANY (a Corporation Organized Un-
der the Laws of the State of New
York), and EMPIRE STATE-IDAHO
MINING & DEVELOPING COM-
PANY (a Corporation Organized Un-
der the Laws of the State of New
York,
Defendants.)

No. ———.

Affidavit of Charles Sweeny.

State of Idaho, }
County of Ada. } ss.

Charles Sweeny, being first duly sworn, on his oath de-
poses and says:

That he is a citizen of the United States over the age
of fifty-two years. That he is the same Charles Sweeny
referred to in the bill of complaint in the above-entitled
action; that he has read the said bill of complaint and
the affidavits filed on behalf of the said complainants in
their application for the appointment of a receiver and

for the granting of an injunction in said case. That he is personally acquainted with the affiants, and all of them. Affiant further says that he has read the affidavit of Patrick Clark, filed in said cause on said application for an injunction and receiver. That the statements therein made by the said Clark as to his knowledge and information as to the condition of the Tiger and Poorman mine and of the Ella and Missing Link mines, at all times prior to the sale of the said Ella and Missing Link claims by said Clark to the defendants the Buffalo Hump Mining Company, this affiant believes to be untrue. That said Clark had for many years the personal management and control of the work in all of said mining claims, and because of his experience both as a practical miner and as manager of a mine and as a manipulator of mining enterprises and deals, availed himself of all knowledge that could be had as to the developments in said mining claims. That at no time were the said mining claims, or the workings or developments therein ever closed against the said Clark, but on the contrary, the said shafts, tunnels, drifts, and excavations on all of the said mining claims were at all times open to the said Clark so that he might come and go freely and make any and all examinations of the same that he desired to do. That at the time of the purchase of the said Ella and Missing Link lode claims the said Clark gave this affiant to understand that he was fully acquainted with the said mining claims and the developments thereon, and neither asked this affiant as to such developments, or expressed any desire to obtain any further information or make any examination of

the said mining claims. That this affiant was not the moving party in the purchase of the said interest in the said Ella and Missing Link lode claims, nor did this affiant suggest or fix any price for said interest; that said price was fixed by the said Clark, and, it being satisfactory to this affiant, as the representative of the said Buffalo Hump Mining Company, this affiant merely accepted the offer that was made him. That no representations in regard to the value of the claims were made, nor was there any discussion as to the value of the claims, at the time of the purchase of the interest of the complainants, nor at any time prior thereto, in which this affiant or any other person, so far as this affiant is advised, made any representations to said Clark, or to any person representing the said complainants, or any of them, as to any ore bodies that had been found or known to exist in or within the said Ella or Missing Link lode claims, for the reason that the question as to the existence of such ore bodies was not at any time under consideration or discussed by either or any of the parties to the said deal.

This affiant further says that such exploration as had been made at the instance of this affiant as general manager of the Buffalo Hump Mining Company, prior to the execution and delivery of the deed by the complainants to said company, were at no time secret, nor was any knowledge withheld from any person entitled to the same; but had any of the said complainants at any time requested information as to the said developments, it would have been cheerfully given them. This affiant further says that such developments as were made by ex-

cavations or diamond drill for the purpose of prospecting the Tiger and Poorman and neighboring properties, were made openly and without any secrecy, or the withholding of any knowledge from any person who might be considered entitled to receive such knowledge, upon their request for the same. That this affiant believes that the said Clark was fully advised as to the explorations and prospecting that had been engaged in within the Tiger and Poorman lode claims, and of the object of such explorations. This affiant says that it is not true, as stated in the affidavit of said Clark, that this affiant ever made any statements to the said Clark or to any person, that the Ella and Missing Link claims were without value, or made any statements as to the value of the said Ella and Missing Link lode claims, as pretended and set forth in the affidavit of the said Clark. This affiant further says that it is not true that the said Clark relied upon any statements made by this affiant as to the value of the Ella and Missing Link lode claims.

This affiant further says that the price paid to the complainants for the Ella and Missing Link lode claims was a full and adequate price, and represented the full value of said claims; that the said Ella and Missing Link lode claims had no value except to the owner of the Tiger-Poorman claims, through whom they might be worked. That at the time of the purchase of the said Ella and Missing Link lode claims by the Buffalo Hump Mining Company, there was nothing known to this affiant or any other person, so far as this affiant knows, that the Ella and Missing Link lode claims had any value in excess of

the price paid for the same, or that any considerable ore bodies existed therein. It is not true that this affiant stated to the said Clark at any time that he had purchased the interest of the said F. R. Culbertson in the said claims for the sum of five hundred dollars; that the fact is that this affiant did not, nor did any person, purchase the interest of the said Culbertson in said claims until long after the complainants sold their undivided four-fifths interest in the said claims. That the allegation contained on page two of the affidavit of the said Clark, wherein Clark alleges that this affiant stated that the Ella claim had no value, that it was not worth fifteen dollars, is absolutely untrue; that it is not true as alleged in said affidavit, that this affiant replied to the inquiry of said Clark, that the Ella claim would be of some value for forming the basis of a new corporation that this affiant was about to float, or would make a bog showing of surface ground, or that while the said claims were of no value as mining claims, nevertheless they would be of some value in the furtherance of the new proposition, or in effecting the organization thereof. This affiant says that he had no intention of, nor was he considering the formation of a new corporation in connection with the said mining properties referred to in said affidavit, nor was such corporation ever formed. That the reason the affiant purchased the said mining claims for the Buffalo Hump Mining Company was that the Buffalo Hump Mining Company was then the owner of the Tiger and Poorman claims and of an undivided interest in the O'Neil lode claim on the east of the said Ella and Missing Link lode claims, and desired

to own the said Ella and Missing Link lode claims that they might pass through to the said O'Neil ground, when it should be desirable to work the same, having then in contemplation the purchase of the outstanding interest in the said O'Neil claim.

Affiant further says that he did not buy or negotiate for the interest of the said F. R. Culbertson in the said claims until after he had purchased the undivided four-fifths interest of the complainants therein. Affiant further says that he never suppressed any facts or made any false statements in regard to the said Ella or Missing Lode claims to the said Clark or any other person at any time.

Affiant further says that he is the general manager of the Empire State-Idaho Mining and Developing Company, the present owner of the Ella and Missing Link lode claims, as well as of the Tiger and Poorman lode claims. It is not true that the ore is being mined from the Ella and Missing Link lode claims in such a manner as to render it impossible or inconvenient to ascertain at all times the amount and value of the ore extracted from the ground claimed by the complainants.

This affiant says that it is not true, as alleged in the fourth paragraph of the complaint that any of the complainants have been or were denied access to the ground in controversy, and this defendant further says that at no time since the purchase of the said claims has there ever been mined from the said claims ores in excess of one hundred and fifty tons per day, and that the statement contained on the fourth page of the affidavit of the said

Clark that it is quite within the power of the defendants to extract five hundred tons of ore per day from the Ella lode claim, is an absurd and wild statement, containing no element of truth. That it would be impossible to extract to exceed two hundred tons of ore per day from the said Ella ground, in any ore bodies that have yet been discovered therein since the purchase of the said claims by these defendants.

This affiant says that there is no reason for the appointment of a receiver of said property. That to appoint a receiver therefor would simply result in shutting down the property. That the defendants have no desire to, and will not remove or destroy any marks or monuments, or obliterate anything, the existence of which are necessary for the establishment of any and all facts pertaining to the purchase, operation, or working of the said mines, or any part of them. It is not true that defendant is filling up the stopes with waste or with any other material, or contemplates, or will do so. That the quantity of ores that have been and are being extracted from said Ella and Missing Link claims can be ascertained by the measurement of the stopes from which said ores are being taken, should it be desirable so to do.

Affiant further says that the ores being mined from the said Ella and Missing Link lode claims are of about twelve per cent lead and six and one-half oz. of silver, and make a concentrate of about six tons into one; that the said concentrates have a value of about fifty-six per cent of lead and 25 ounces silver.

Answering the affidavit of Joseph MacDonald this affiant says that the said Joseph MacDonald was never at any time in the employ of either of the defendants, in any capacity whatsoever. That it is not true, as stated in the affidavit of the said MacDonald that he was the advisory engineer of the Consolidated Tiger and Poorman Mining Company during this affiant's connection with the said Consolidated Tiger and Poorman Mining Company, or that he was ever the advisory engineer of the Buffalo Hump Mining Company. That it is not true that the said MacDonald ever advised this affiant, as Manager of the Buffalo Hump Mining Company, or at all, to put in diamond drill holes, or that because of any advice of the said MacDonald to any person, the Buffalo Hump Mining Company, under the management of this affiant or of F. R. Culbertson, or at all, employed one C. W. Butler, to prosecute prospecting in that direction, or employed C. W. Butler at all. It is not true that the said Buffalo Hump Mining Company, or this affiant, or any person having authority, or acting for the Buffalo Hump Mining Company, or this affiant, because of the advice of the said MacDonald, made any excavations, or did any work or any explorations in or about the Ella lode claim or the Missing Link lode claims, or hired any person to operate a diamond drill or prosecute prospecting by a diamond drill or otherwise in any direction. That it is not true that because of any advice or suggestion on the part of the said MacDonald, the said C. W. Butler, or any other person, put any number of drill holes from the abandoned drift, or any drift in the twelve hundred foot

level, or any level, or any level into the Ella lode mining claim in a southerly direction, or in any direction, or in each instance struck a large body of ore in what is now known or what was ever known as the Ella drift proper. nor were there any diamond drill holes ever started in the Ella ground. It is not true so far as this affiant is informed and believes, that the said MacDonald was ever present or saw any cores from the said diamond drill holes, or had samples of the same assayed; that it is not true that there was fully five feet of clean ore in any diamond drill hole, or three feet in another, or that any diamond drill hole averaged from three to five feet of clean ore in the Ella ground. This affiant says that there was never but one diamond drill hole bored into the Ella claim and Missing Link claim by either of the defendants or by this affiant, or by their direction, and that the said hole did not start within the Ella ground, and only went a short distance in from the easterly side of the Ella and Missing Link ground, and that there was found in said drill hole only a small ledge of concentrating ore, the value of which could not be ascertained with any degree of certainty, and was not ascertained by this affiant until months afterwards, and that upon such ascertainment, it did not prove to be a large or valuable body of ore. That at the time the said diamond drill hole was made, which penetrated the said Ella and Missing Link lode claim as aforesaid, it was not the intention of the defendant or of any person representing it, that the said diamond drill holes should be so made or directed as to penetrate either the Ella or Missing Link ground, but it was the intention

of the defendant, the then owner of the undivided interest in the O'Neil lode claim, to start the said drill hole from the end of the twelve hundred foot level within the O'Neil ground and to continue the said diamond drill hole entirely within the said O'Neil claim, crosscutting the same. That the cause of the carelessness of the man having charge of the said drill hole, the drill was not started in the right direction and consequently slightly penetrated the said Ella and Missing Link lode claims, and the defendant, the Buffalo Hump Mining Company, nor any of the defendants, nor its representatives ever knew that the said diamond drill hole had penetrated the said Ella and Missing Link lode claims until after the said defendant had purchased the Ella and Missing Link claims and had extended its drifts and excavations to the point where said diamond drill hole had so penetrated the said Ella and Missing Link lode claims. This affiant says that the alleged and pretended facts and statements set out in the affidavit of the said MacDonald, which he says were all known to this affiant and to F. R. Culbertson, prior to October 1, 1899, are false allegations and untrue in every particular.

This affiant says that he does not know what the intention of the said MacDonald may have been prior to, or for several months prior to August, 1899, in regard to procuring a lease or bond on the said Ella claim from said Clark and his co-owners, or as to whether or not he notified Culbertson of his pretended intentions, in that regard, or as to what may have passed between the said

Culbertson and the said MacDonald, except as said Culbertson may have stated same to this affiant.

This affiant denies that in the month of September 1899, he came to the said MacDonald and stated to him that he ought not to procure a lease on the said claim from said Clark, but that he should stand in with this affiant and this affiant would procure him a large amount of stock in a new company that he was about to form for the purpose of purchasing that and other mines in the vicinity, or that the said MacDonald could make a great deal more money by standing in with this affiant than by taking a lease on the said claims from the said Clark and his co-owners; or that at any time this affiant asked the said MacDonald not to mention anything about a strike of ore to Patrick Clark or his co-owners; or that thereafter and prior to October 13, 1899, or at any time the Buffalo Hump Mining Company run a crosscut near the Ella west line and struck any ore body in the Ella claim, as alleged in the said affidavit of MacDonald, or had drifted more than sixty feet upon any such ore body prior to October 13 1899, or that in said pretended drift or any drift there had been encountered any body of clean shipping ore, averaging from three to five feet in width from the said crosscut to the breast of said drift, so as alleged in the said affidavit of said MacDonald.

This affiant says on information and belief that it is not true that said MacDonald was in the drift in the Ella claim on the twelve hundred foot level five or six days prior to October 13, 1899. Says that it is not true

that there was at that time, or at any time, from eighty to one hundred and fifty feet of clean shipping ore in said drift. This affiant says that the statement contained in the last paragraph of the affidavit of the said MacDonald is not true. That this affiant does not believe that the said MacDonald ever at any time considered the Ella and Missing Link lode claims to be worth a million dollars, or to be worth any sum over and above the price paid to the complainants for the same. But this affiant believes that the said MacDonald in making the affidavit made and filed by him herein, was actuated by spite and malice in doing so. That the said MacDonald, during the year 1899, sought to enter the employment of the companies represented by this affiant, and this affiant did consider the propriety of making an arrangement with the said MacDonald for entering the employment of the said companies, but because of certain statements made by the said MacDonald which came to the knowledge of this affiant, this affiant concluded that the said MacDonald was not reliable in business transactions and could not be believed, either in the ordinary course of business, or under oath, and therefore broke off all negotiations with the said MacDonald looking toward his employment by any companies represented by this affiant; and affiant believes that all of the statements made by the said MacDonald in his affidavit filed herein, wherein he claims to have had any conversation with this affiant, or wherein he claims to have seen any cores from diamond drill holes, or to have seen any ore bodies in the Ella

or Missing Link lode claims, or any statements that he has made in regard to said claims, are wilfully and maliciously false, and made for the sole purpose of harassing and injuring the defendants and this affiant.

Answering the affidavit of J. C. Ralston, this affiant says that if the said Ralston made the surveys which he alleges to have made in his affidavit, he made same by surreptitiously and secretly sneaking into the mine under false pretenses and by means of disguises; that by such acts he obtained such alleged information and the opportunities of making measurements and surveys which he could have obtained in a legitimate way by a courteous request to be permitted to inspect the said mines, but that evidently preferred to do in such surreptitious manner the things that he claims to have done. That when said Ralston prophesies as to the manner in which the stopes will be filled, or refilled with waste, or as to the effect thereof, that he is guessing; that he knows nothing of the manner or method by which the said mine are being operated and worked.

This affiant says that the value of the ore extracted from the Ella and Missing Link lode claims does not exceed \$25,000.00

This affiant further says that in all of his transactions with the complainants, whether personal or on behalf of either of the defendants, that this affiant has acted in the utmost good faith and candor; that he has not attempted at any time to mislead the complainants or any of them, or withhold any facts as to the development of said ore bodies, or the value of the same in the Ella

and Missing Link lode claims. That this affiant purchased the same for the defendant, the Buffalo Hump Mining Company, and paid complainants therefor their own price, and paid complainants for the said Ella and Missing Link lode claims at the same rate as he afterward paid the said Culbertson for his interest therein. That it is not true that he, or the defendant Company, paid the said Culbertson any price for his said interest in the said claims in excess of that paid to each of the complainants. That the whole price paid for the said claims was five thousand dollars; that in the judgment of this affiant these claims at that time were not worth any more than the sum paid, and that they are not now worth any more to any other Company or person. That said claims have no value or would have no value, except to persons situated as the owners of the Tiger and Poor-man mines are situated. That the ore bodies that are being and have been worked, and will be worked in the future, by the defendant, the Empire State-Idaho Mining & Developing Company, could not be made available to work to a profit by anyone except the defendants. And this affiant denies positively each and every allegation, intimation, charge or insinuation or misrepresentation, fraud or unfair conduct or speech charged against him in connection with the purchase of the Ella and Missing Link lode claims, whether same may be charged in the bill of complaint filed in this action, or in any affidavit or statement filed in support of the motion for injunction or receiver.

Affiant further says that the matters and things stated

in this affidavit that were done or performed by the employees of the defendant corporation, or by persons acting or working under the direction of this affiant, as general manager of such corporation, are based upon the statements made to this affiant, to those acting under his direction in carrying out his instructions as to the doing and the manner of doing such things. That as general manager of the corporation defendant, it is not possible for affiant to see or personally know of the doing of all of the acts and things concerning the working and operating of the property of the defendants, but that affiant has given, and at all times does give careful attention to the giving of instructions and to the manner in which they are carried out and all of the statements herein contained as to the matters and things that have been done in connection with the working, developing and operating of the mining claims of the defendant, have been carefully investigated by this affiant and found by him to be true.

CHARLES SWEENEY.

Subscribed and sworn to before me, this 13th day of September, 1901.

A. L. RICHARDSON,

Clerk.

J. C. RALSTON, recalled on behalf of plaintiffs, testified as follows:

Direct Examination.

(By Mr. STOLL.)

Mr. Ralston, referring to the map which was put in by the other side, showing a longitudinal section, showing the Clark stopes in connection with the longitudinal section, you have seen that map have you?

A. Yes, sir.

Q. I will ask you to state whether it is correct.

A. I judge it to be correct, excepting that it did not show the two stopes in the 800 in correct outline.

Q. That is what I mean. In what respect were those stopes not accurately shown?

A. The stopes are shown in a blurred form of a lead pencil drawing, a blue pencil, as I recollect it, and show no specific outlines; but, in a rough way, possibly, their general or approximate location.

Q. The stope in the east, in the Ella ground, was that correctly shown upon their map, pretending to extend into the Ella or Missing Link?

A. It could not be correctly shown if shown as I say it was.

Q. Was it correctly shown upon their map?

A. No, sir.

Q. Have you made a survey and actual measurement of the premises, so that you can give us from your own knowledge a correct plat or map, showing a longitudinal section?

A. I have.

(Testimony of J. C. Ralston.)

Q. Have you that prepared?

A. Yes, sir; this is the map.

Q. When did you make it?

A. I finished it a couple of days ago.

Q. When did you make the surveys?

A. Last Friday, I think it was.

Q. Where?

A. On the 800 level of the Tiger-Poorman mine of Burke, Idaho.

Mr. STOLL.—We offer this map in evidence.

(Same was admitted without objection, and marked Plaintiffs' Exhibit, No. 43.)

Q. Who accompanied you to Burke and assisted you during your examination of those stopes?

A. Mr. James Harvey.

Q. One of the complainants in this case?

A. Yes, sir.

Q. Who else, representing the defendants, accompanied you through the works?

A. Mr. Smith and Mr. Cartwright, on behalf of the Tiger-Poorman people.

Q. How did you get access to the 800 stopes?

A. By going down the main shaft of the Tiger-Poorman to the 1,100, and easterly on the 1,100 to the raise up into the 800.

Q. You went up the raise into the 800?

A. Yes, sir.

Q. What is the condition of the floor of the 800?

A. It is filled generally with debris and falling ma-

(Testimony of J. C. Ralston.)

terial, which accumulates generally and naturally in old workings.

Q. Did you see any indication there of a trench having been dug, or were you shown where a trench had been dug to the floor of that opening on the 800?

A. No, sir, we saw no indications, nor were we shown any trenches.

Q. What assistance was given you by Mr. Cartwright and Mr. Smith, representing the defendants, when you went through there, in the shape of pointing out to you the ore bodies which they had found there?

A. They offered no assistance; they merely accompanied us, making notes occasionally, as we ourselves sometimes made notes. Sometimes they made notes when we did, and sometimes they did not.

Q. Did you make a drawing of the roof, of what they have seen fit here to call the Clark stopes, showing accurately the ore seam, its size and extent?

A. Yes, sir.

Q. Have you the drawing in your hand at this time?

A. Yes sir, this is the drawing, on a scale of four feet to the inch, showing the back or roof of the Clark stope.

Q. Does that correctly show the size of the ore seam?

A. Yes, sir.

Q. From actual measurements made by you, at the time?

A. Yes, sir.

Q. As it continues the entire length of that roof?

A. Yes, sir.

Mr. STOLL.--We offer that drawing in evidence.

(Testimony of J. C. Ralston.)

Mr. HEYBURN.—We object to it as incompetent and not proven.

(Said drawing is marked Plaintiffs' Exhibit No. 44.)

Q. Did you also make a drawing of the west face of the Clark stopes?

A. Yes, I have the drawing here on a scale of four feet to the inch, showing the west face of the Clark stope from the roof or back thereof downward to the S00, but omitting part of the vein between the first and second floors. That omission is made because the vein could not be seen at that point. Above that, however, the vein was seen, and this drawing correctly represents what we saw and measured in that face.

Q. How is the ore seam indicated on that drawing?

A. By a dark red color enclosed in black lines running down through a background of yellow.

Q. What does the yellow streak through there represent?

A. The yellow streak represents the vein, or the fault plane, rather, in which the ore occurs, while the green on each side represents the enclosing walls.

Q. Is the same true of the drawing which is marked Plaintiffs' Exhibit No. 44, of which you testified just a moment since? A. Yes, sir.

Mr. STOLL.—We offer this drawing in evidence.

(The same is marked Plaintiffs' Exhibit No. 45.)

Q. Did you also make a drawing of the east face of the Clark stopes? A. Yes, sir.

Q. Have you the drawing?

(Testimony of J. C. Ralston.)

A. I have the drawing here, on a scale of four feet to the inch, showing the east face of the Clark stope for its entire distance, from the 800 level to its back. The same system of colors are used in this drawing that has been used in the other drawings of this stope.

Q. You now have the east face, the west face, and the roof of the entire stope? A. Yes, sir.

Mr. STOLL.—We offer this drawing in evidence.

(Said drawing is marked Plaintiffs' Exhibit No. 46.)

Q. Who made the measurements from which you have made this drawing?

A. Mr. Harvey and myself.

Q. You are able to testify that each of those drawings correctly represents the size of the ore seam which they purport to represent? A. Yes, sir.

Q. State, now, what the width of the ore-bearing seam on exhibit 46 is in the east face?

A. Beginning at the back of the roof and going downward on that seam, I have a measurement first of five inches, another one of three inches, another one of five inches, another one of two inches, another one of eight inches, another one of six inches, another one of two inches, another one of seven inches, another one of two inches, another one of five inches, and another of four inches.

Q. Referring to exhibit No. 45, what does that represent? A. This is the west face.

Q. State the width of the ore seam there.

A. Beginning at the back or roof and going down-

(Testimony of J. C. Ralston.)

ward, I have the first measurement recorded of five inches, another one of eighteen inches, another of six inches, another of five inches, and another of four inches.

Q. Referring, now, to the roof of the Clark stope, exhibit No. 44, state what you found the width of the ore seam there to be.

A. Beginning at the east end of the roof, I have a measurement of four inches, another of six inches, another of four inches, another of five inches, another of ten inches, one point at which there is no width of ore or quartz, another of five inches, and another six inches.

Q. The floor of that drift you have stated, I believe, was covered with debris and other material, making it impracticable and impossible to make an examination of it? A. Yes, sir, it was covered, as you say.

Q. And you saw no indications that anybody else had ever examined it? A. I saw none.

Q. And you were not told by any of the persons that accompanied you that an examination had ever been made of it? A. No, sir.

Q. At the point where the raise enters the Clark stope from the the 1,100 how much ore was there?

A. I don't remember, now. I will have to refer to notes to state that.

Q. Get your notes. A. I haven't them here.

Q. Where are they?

A. They are at my office.

Q. Please send for them. I refer now to where the raise enters the 800.

(Testimony of J. C. Ralston.)

A. Where the raise enters the 800?

Q. Yes.

A. Oh, I understood you to say at the beginning of the 1,100.

Q. (The preceding questions were read.) Well, that was my mistake.

A. On the west side of that raise, the west face of it, immediately under the floor of the 800, there is a seam of quartz and ore, possibly about two inches wide.

Q. How about the other face of it?

A. There is no quartz or ore showing in the east face of that raise.

Q. In what territory is the east side of that raise?

A. It is very close to end line of the Poorman-Ella.

Q. From a measurement, what do you state as to whether it is within the Ella or within the Poorman?

Mr. HEYBURN.—The east side? Do you mean to say?

Mr. STOLL.—The west side.

A. Oh, the west side within the Poorman ground, and the east side in the Ella ground.

Q. Now, going downward in that raise, how do you find the ore?

A. I find it for some distance downward very narrow.

Q. How narrow?

A. Oh, at its narrowest place on the west side there I think it was about an inch and a half, and slightly, in a general way, increasing downward from the 800, until

(Testimony of J. C. Ralston.)

I think, perhaps, about the 16th floor it got to be some reasonable width.

Q. Have you a drawing showing a longitudinal section of that raise? A. Yes, sir.

Q. Show it to me.

A. It is this one (referring to Plaintiffs' Exhibit No. 43).

Q. No, I mean a small drawing.

A. I didn't make that. This is a longitudinal drawing, which includes the raise with the stopes.

Q. Mr. Ralston, you heard the testimony of some of the witnesses for the defendants in this case, stating that there was merchantable ore in the 800 in what we call the Clark stopes. What do you say about that?

A. I saw very little merchantable ore in the Clark stopes.

Q. Did you take samples from those different ore seams of which you have given us the drawings?

A. Yes, sir.

Q. Have you had them assayed? A. No, sir.

Q. Have you them in court?

A. I have them here.

Q. Referring to the Complainants' Exhibit No. 2, which is a drawing of the 1,200: Assuming this to be upon the 800, how far a distance would have to be driven through barren rock to reach what is called the Clark stope from the east workings in the Poorman?

A. About 285 to 290 feet.

Q. What would be the cost of that?

(Testimony of J. C. Ralston.)

A. Well, I presume that would cost, perhaps, \$12 a foot to run. That would be \$3,480.

Q. Did you measure and calculate the cubical contents of the void in the so-called Clark stope on the 800?

A. Yes, sir.

Q. What does it amount to in tons?

A. I estimated it to contain 1,800 tons.

Q. That is being how high?

A. To a distance of—

Q. Well that includes the 600?

A. That is the entire shoot from the eight up to the six.

Q. Includes the six, doesn't it? A. Yes.

Q. Did you estimate the value of that ore?

A. Yes.

Q. What is it?

A. We assumed it to be fifteen per cent ore.

Q. What is the result as to value?

A. We estimated that in that shoot there would be approximately 270 tons of fifteen per cent ore, which, at seven ounces of silver to the ton, would give a total value to the shoot of \$4,068.90.

Q. (Cross.) Of ore in the Clark stope?

A. In the Clark shoot from the eight up to the six.

Q. The cost of running the drift from the east workings of the Poorman through that barren ground would be, you said, how much, to reach this ore?

A. Three thousand four hundred and thirty-two dollars.

(Testimony of J. C. Ralston.)

Q. And would that drift have to be run on each level from the Poorman workings to tap that ore body in going downward? A. Necessarily.

Q. That is, if it was worked through the Poorman mine? A. Yes, sir.

Q. What do you say then as to whether, assuming the values to be as you found them in the Clark stopes, it would pay to work those ores?

A. It resolves itself into a mathematical calculation in which it is very apparent that it would not pay. For instance, there are, as I said before, I estimated there would be 1,800 tons of material to be taken down upon that shoot, to mine, which would cost probably three dollars a ton. That would be \$5,400. Added to that the cost of running 286 feet of tunnel at twelve dollars a foot, being \$3,432, or a total of \$8,832, representing the total cost of extraction, out of which we take 270 tons of ore, that we estimate fifteen per cent ore, netting \$4,068.90. The difference between those two would leave a balance of \$4,763, in debt, after having pursued that operation.

Q. If the values and the size of the ore body did not increase as you went downward into the earth, would those same conditions continue to exist?

A. Yes, sir.

Q. Mr. Ralston, you say you have some samples here which you and Mr. Harvey took from the faces and roof of the Clark stopes? A. I have.

Q. Please produce them.

(Testimony of J. C. Ralston.)

Mr. HEYBURN.—I would like to have the witness identify the Clark stope; you mean the most westerly of the stopes on the 800?

A. The most westerly—the one that lies approximately in the middle of the Ella ground.

Q. State where you got those samples you just produced, what they are, and number and identify them.

A. These are the samples taken from the faces of the Ella or Clark stope. Sample No. 3 is a sample taken from the east face of the second floor of the Clark stope. This sample was broken from the full width of slab or vein or quartz and ore; in other words it represents the full width of the vein; broken from the vein as it stood; between my fingers (holding up sample) representing the width of the quartz and the ore.

Mr. STOLL.—We offer that sample in evidence.

(Same is marked Plaintiffs' Exhibit No. 47.)

A. (Continued.) Sample No. 2, at the back or roof over the ladder in the Clark stope of the 800 foot level above the 4th floor. The sample shows the full width of vein of ore and quartz.

Mr. STOLL.—We offer this sample in evidence.

(Same is marked Plaintiffs' Exhibit No. 48.)

A. (Continued.) Sample No. 1 from face of third floor of the Clark stope, 800 foot level, about two inches wide, being the total width of ore, just the same as those others, though this one has become broken since.

Mr. STOLL.—We offer this sample in evidence.

(Testimony of J. C. Ralston.)

(Same is marked Plaintiffs' Exhibit No. 49.)

A. (Continued.) Sample No. 4 represents the full width of ore seam on the west side of the raise from the 1,100, where the raise breaks into the 800 foot level.

Q. What is the size of that sample?

A. That is the width of the ore as it stands, perhaps, an inch and a half.

Mr. STOLL.—We offer this sample in evidence.

(Same is marked Plaintiffs' Exhibit No. 50.)

Q. You got those samples yourself, did you, Mr. Ralston?

A. Mr. Harvey and myself, yes, sir.

Q. Did you take fair samples with a view to being as fair to the mine as possible?

A. Those are fairly representative samples, I think, yes, sir. Certainly we could not take any more than what is here when we have taken the full width of the vein.

Q. Now, referring to the other stope that you found on the 800 level east of the stope, where you got those samples, what did you find there?

A. We did not pay as much attention to the stope in the O'Neil ground as we did in the other, because, while we went through it, it was not on the ground in question, and therefore made no definite notes.

Q. What did you find in the east face of that?

A. In the east face of the east stope?

Q. The west face of the east stope.

A. The west face? Well, we found that that face had been lately broken. We found a moderately new

(Testimony of J. C. Ralston.)

clean face, as against the other parts of the stope, which were not new and not clean

Q. How much has been knocked off of the face there?

A. Assuming that the stope stood vertically as it naturally would, with the timbers, there must be, perhaps, at least, six feet of new material taken out.

Q. Where was the material that was knocked down out of that stope?

A. It had fallen and rolled down below.

Q. Was it there in the stope?

A. Yes, sir; apparently so.

Q. What did it consist of?

A. Broken down vein stuff and some talc.

Q. How much ore did you find in the face in place?

A. My recollection is that there were about six inches of ore there.

Q. What character of ore?

A. Much the same as those samples.

Q. What was there in the other face of it, the east?

A. I think, as I recollect it, that face showed about an average there of something like the other, and depending wholly on recollection. We made no definite notes of it.

Q. What was the roof like?

A. The roof did not impress me much differently than the roof in the Clark stope.

Q. What was the condition of the floor in that stope?

A. On the 800?

Q. Yes, the east stope on the O'Neil ground.

(Testimony of J. C. Ralston.)

A. The floor was the same as elsewhere, namely, filled with debris, accumulated material, which one would naturally expect to find after a stope had laid idle for several years.

Q. Did you make a survey and measurement for the purpose of determining whether that east stope was within the Ella and Missing Link ground?

A. Yes, sir.

Q. What do you say from your measurement as to where it is?

A. In that measurement I found that the stope proper is in the O'Neil ground.

Q. How far is the west face of it from the Missing Link line?

A. The west fact of this newly sloughed or broken down, torn down ground, of which I spoke, probably, falls without the O'Neil and within the Missing Link two or three feet.

Q. And about six feet had been broken down in the west face, I understand, you to say?

A. Yes; somewhere about that; six feet possibly in height.

Q. Was the floor of that east slope, the No. 1 and 2 floors of that east stope, in the Ella or Missing Link ground at all? A. No.

Q. How far from the line would it be?

A. In the vicinity of 17 feet.

Q. Seventeen feet into the O'Neil, I understand you to say? A. Yes, sir.

(Testimony of J. C. Ralston.)

Q. Mr. Ralston, what connected those two stopes?

A. The 800 main drift.

Q. What was in that drift in the shape of ore?

A. No ore could be seen through the drift as I recollect it, and I think it was largely, in fact almost wholly, the roof was wholly covered with stulls nailed down, or at least we asked if they were nailed, and I think my recollection is they said they were all nailed; at any rate, we didn't try it.

Q. No indication of ore there anywhere?

A. It was covered up, we could see no indication of any vein.

Q. Referring to Exhibit No. 18, put in by the defendants, have you examined that mass of rock over there?

A. I have looked at it.

Q. Did you hear the testimony of the witnesses as to where that came from?

A. Yes, sir.

Q. Please state the facts, if you have any explanation to make concerning that?

A. That piece of ore apparently, as the witnesses have stated, purports to be a piece of ore broken from the southwest corner of the intersection of the intermediate drift and the crosscut on the 1,200. On one occasion when I entered that mine I remember very distinctly of making a note of the appearance of this particular corner, and finding at that time a good deal of ore standing there. I found that corner in much the same general appearance as the general vicinity of those workings. On a later date when the same vicinity was

(Testimony of J. C. Ralston.)

visited by myself and a party consisting of Mr. Harvey and two others, we found that that corner had been broken down, a triangular piece had been broken off the corner. So that much of the good ore which was seen there originally was necessarily not to be found. And I imagine this piece in question now is the—

Mr. HEYBURN.—That triangle?

A. I don't say that triangle. I say I imagine it possibly came from that corner behind the triangle, if anything. I don't know where it came from.

Q. On any of your visits there did you take a photograph of what you found?

A. Yes, sir; I took a number of photographs.

Q. State where you photographed and what you photographed, and when you did it, and who was with you?

A. Those photographs were taken on September 20th or 21st of last year on the first occasion of my going up to the mine.

Q. Who were with you?

A. Mr. Harvey, Mr. E. C. MacDonald, Joe Doland, and one or two others. Amongst other things which was done on that trip some photographs were taken.

Q. What have you a photograph of there?

A. I have, for instance, here, a photograph marked No. 4, on the back, showing the southwest corner of the crosscut, and intermediate drift of the 1,200 foot level, showing the fresh face. This is the face of which I have just been testifying.

(Testimony of J. C. Ralston.)

Q. How much ore was there at the time that photograph was taken?

A. There was practically no ore. There were then some streaks running through, perhaps, much the same as you would find them there, but not the amount of ore which I said originally existed. This is taken to show the condition there and to show the little streaks of ore which now exist, and to show the newness of the face.

Q. Does this show the corner from which that slab of rock, Defendants' Exhibit No. 18, was taken?

A. That shows the southwest corner.

Q. Indicate it from there what particular point that corner is, or is this the corner itself?

A. That is looking at the corner itself.

Q. Before or after the ore was taken off of it?

A. After.

Mr. STOLL.—We will offer this photograph in evidence.

(Same is marked Plaintiffs' Exhibit No. 51.)

Q. What other photographs did you take?

A. I have another photograph here marked No. 6, showing the width of the intermediate drift just east of the crosscut in the 1,200 foot level. It is intended to merely illustrate the width of that drift. It shows a man standing in the center of the drift with his arms extended this way, and apparently neither hand reaching the side walls.

Mr. STOLL.—I will offer this photograph in evidence, as Plaintiffs' Exhibit No. 52.

(Testimony of J. C. Ralston.)

Q. How large a man was it that was standing in the drift?

A. A man who stood, perhaps, at five feet eleven.

Q. What other photograph have you?

A. I have a photograph marked my No. 8, which shows the west face of the east drift of the 1,200 in Ella ground. That is the long drift where it begins and the crosscut ends.

Q. How far from the crosscut?

A. It is at the end of the crosscut, at the south end of the crosscut.

Q. What is the purpose of that?

A. This is merely taken to show the ore and vein as it stands revealed in this breast, showing how the ore runs down, and its usual dip, and how also it widens as it extends. And is shown here to illustrate amongst other things how a great body of ore, or any body of ore, might on a specific level cut off or decrease materially in size, and how when taking a sample along the floor one would find a six-inch streak of ore, where as immediately above it you might have ten feet of ore. I turned that upside down, and have a practical illustration of what is alleged to exist in the vicinity of this first photograph which I showed, where Mr. Wiard testified as to a trench having been driven across or along this crosscut, and across the intermediate, where he testified to two six inch streaks. This very happily illustrates that feature of it.

(Testimony of J. C. Ralston.)

Q. How much ore, by turning it upside down, do you have there, as shown upon the photograph?

A. In this particular case you have approximately three times as much ore above this line as you have below it.

Mr. STOLL.—I will offer this photograph in evidence as Plaintiffs' Exhibit No. 53.

Q. Mr. Ralston, did you hear the testimony of Mr. Cartwright, and, perhaps, another witness or two, to the effect that a trench had been dug on the 1,200 at the crosscut?

A. Yes, sir.

Q. And that they had taken samples from that trench?

A. Yes, sir.

Q. When you visited the mine there with Mr. Harvey when did you say that was?

A. September 20th and 21st.

Q. No, recently?

A. I think it was last Friday.

Q. What day of the month?

A. Friday was the 24th. We went to work on the 24th and visited the mine on the 25th of January, 1902.

Q. At that time, who accompanied you through the mine?

A. Mr. Smith and Mr. Cartwright.

Q. Both in the employ of the defendants?

A. Yes, sir.

Q. They were sent with you for the purpose of—at least they did accompany you and took observations as to what you did?

A. Yes, sir.

Q. Did they give you any advice or state to you any—

(Testimony of J. C. Ralston.)

thing about their having dug a trench on the 1,200 at that crosscut? A. No, sir.

Q. And what they have found there, or invite you to go down and inspect it?

A. No, sir. No reference was made to trenching or sampling of trenches, or anything of that character.

Q. Did they give to you any other assistance or point out to you at any place in the mine any physical conditions that would either aid you in testifying for the complainants or put you upon the right track in case the complainants' theory of this case was incorrect?

A. No. They accompanied us as I said before; they merely accompanied us. Of course we had conversation from time to time, passing jokes and the like of that.

Q. That was all there was to it?

A. That was the essence of the business.

Q. You are an engineer, Mr. Ralston?

A. Yes, sir.

Q. United States Deputy?

A. I am in several states, yes.

Cross-Examination.

(By Mr. HEYBURN.)

Q. Mr. Ralston, I refer you to your blueprint, Plaintiffs' Exhibit No. 43, on which you show several stopes. Is that made from an actual survey made by you?

A. Of the stopes as I stated, all of the lines drawn on that map excepting the 800 level, is a copy of your own map.

(Testimony of J. C. Ralston.)

Q. Then it is not made, or does not purport to have been made from your personal surveys?

A. With the exception just named.

Q. Now, you have drawn the O'Neil stope on this map above the 800 foot level. Did you survey that and make this map from an actual survey of that stope?

A. We made the measurements from which that drawing was made.

Q. I have used the word survey. Did you make it from an actual survey?

A. Actual survey, you understand, includes measurements.

Q. But I will use the term survey. Did you make that from an actual survey with an instrument?

A. Not with an instrument.

Q. You surveyed it with the eye?

A. I made a survey without an instrument.

Q. With the eye?

A. With the tape line, and plumb line and such.

Q. What instruments did you have with you in making or measuring this stope from which you have put it upon this map; that is, the O'Neil stope?

A. The tape line.

Q. Anything else but a tape line?

A. That is all.

Q. You did not have a level? A. No level.

Q. Nor plumb line? A. No, sir.

Q. You just had a tape line?

A. I had a tape line only.

(Testimony of J. C. Ralston.)

Q. What measurements did you make in that; how many?

A. We made a number of measurements first in respect to the width of the ore and the like of that; but the measurements from which the drawing is made consisted in measuring the length of the stope.

Q. At what points; on the floor?

A. On the floors.

Q. And the roof?

A. We did not measure up to the roof. We measured under the roof.

Q. Did you measure along the top of that stope?

A. Yes.

Q. Longitudinally? A. Yes, sir.

Q. How many feet was it?

A. I will scale it for you.

Q. I would like to have your memory.

A. Well, my recollection is now somewhere in the vicinity of fifty feet.

Q. How long was that stope longitudinally along the floor on the 800 feet level?

A. Well, it was some ten or fifteen feet less.

Q. What is the scale of this map?

A. Forty feet to the inch, I think.

Q. And it was ten or fifteen less in length along the floor than it was along the top of the stope?

A. What floor?

Q. Of the 800.

A. The 800 floor, yes, sir.

(Testimony of J. C. Ralston.)

Q. Now, you have said there was about how many feet that have been freshly pulled down.

A. I said my judgment or guess would be that there must have been possibly six feet of it, assuming that the stope stood vertically with the timbers?

Q. Don't you know there has not been any of it pulled down at all since this suit was commenced?

A. Do I know what?

Q. Don't you know there has never been any of the face of that stope pulled down at all since this stope was opened, since this suit was commenced?

A. I don't know that. I think I could say very safely indeed that perhaps there are no large pieces, but there is some of that stope falling.

Q. Now you are using the term falling. Is this purely a question of caving down? I understood you to convey the idea that some one had mined this down.

A. I think perhaps I used two or three words in that connection; I said pulled or fallen. If I did not I should have said so.

Q. What do you think? That that has been mined or pulled down, this six or eight feet of it?

A. Well, I would not like to venture an opinion on that. The only comment is that it is a fresh face, and much of the material lying below is moderately fresh. Conclusions could be drawn of course that it might have fallen, or sloughed off, but on the contrary it could have been blown down by the miners.

Q. And it might have just fallen? The O'Neil stope,

(Testimony of J. C. Ralston.)

as you call it here, or as it is called, did you measure the distance between the Clark stope and the O'Neil stope with the tape on last Friday? A. Yes, sir.

Q. How many feet is it?

A. I have forgotten now unless I scale it there.

Q. You have no recollection on the subject?

A. No.

Q. You had just a tape line?

A. A tape line.

Q. You have drawn the Clark stope. You measured that along the 800 with the tape line, too, didn't you?

A. Yes, sir.

Q. Measured it along the top of the stope.

A. To determine the length of the stope we measured it on the floors.

Q. The drift is perfectly straight between the O'Neil and the Clark stope?

A. Oh, as those stopes prevail there, not a mathematical line.

Q. Can you see from one to the other?

A. I think you can very handily.

Q. You did not make any survey with instruments at all when you were there the other day, of the Clark stopes? A. Not with an instrument.

Q. Just a tape line measurement?

A. Yes, sir. I might say in that connection that I had a copy of your map of the 800, so that I could always determine such data as I should wish to add to whatever I might have accumulated.

(Testimony of J. C. Ralston.)

Q. You have criticised this map. I am using a copy of the map offered the other day, in which you say there is a blurred showing of the Clark stope on the 600. Did you survey that stope any more accurately than the defendants.

A. This is not the map I referred to in my testimony.

Q. No, these are all imprints from the same original.

A. No, sir, I think not. Your first section file, as I recollect it, is not that section.

Q. Well, just call for the exhibit you refer to. They are all here.

A. My recollection is of that, that there was filed when you came into court, another longitudinal section answering the description which I made.

Q. Perhaps I can assist you in this. Is it not a fact that the showing you refer to was on the 800, as it is here on the 1,600 on this map. That was before the 800 foot stopes were available that we showed them in the same condition as we show the 600 on this map, which I now show you. This is the map Mr. Smith identified the other day. Isn't it a fact that the blurred condition on that map you referred to is as shown on the 600 on this map?

A. That is my recollection, that you showed blue pencil spots upon the map at that time.

Q. Don't you know that that was because at that time the 800 foot level was not accessible, that it had not been reached by the opening or development?

(Testimony of J. C. Ralston.)

A. No, I cannot say that. If I did, I had forgotten it. I do not know in fact that it was not.

Q. Why didn't you go up into the 800 when you were surveying before this? This is the first time you had been in the 800, on last Friday? A. Yes, sir.

Q. Why didn't you go in there when you were there before?

A. Well, it was not accessible from below.

Q. Well, that is it. Why not come right out and say so.

A. Well, I do not desire to resort to subterfuge. I desire to be as fair in the matter as possible, and moreover I would not like to have you say that I had criticised your map. It was not in sense of criticism, but in the sense of stating what I recollected of that map, and the reason why I have my stopes showing there.

Q. Have you not seen and had access to this map that was offered in evidence on the 7th or 8th of January hearing, that gave an actual survey of those stopes upon the 800?

A. I don't think I ever saw it until you unrolled it here.

Q. Wasn't you present at the hearing when Mr. Smith testified and offered this map in evidence?

A. Yesterday, I think.

Q. No, this map was put in evidence at the first hearing.

(Testimony of J. C. Ralston.)

Mr. GORDON.—It has been with the examiner ever since then.

Mr. HEYBURN.—All right; I wanted to see what information this witness had. I could not see any object in attacking the accuracy of a map.

The WITNESS.—Well, I think you misunderstood that feature of it, Mr. Heyburn.

Q. Now, Mr. Ralston, you have gone into some figures as to the expense of reaching the ore in the Clark stopes, and have drawn deductions from it that the expense would be so great that it would not pay to run from the stopes into the Poorman over there. Were you referring to the ore above or below the 800 foot level? A. The ore above the 800.

Q. Well, it is all opened up by the 800. A. Yes.

Q. What necessity would there be to run any more levels to get at that ore then?

A. Well, you are speaking of the cost of extraction of the ore?

Q. The cost of extraction would be considered in connection with the present development, would it not?

A. The cost of running of that drift would be charged to whatever ore you were pulling down.

Q. That drift was run many years ago, was it not?

A. Possibly it was; I don't know when it was run.

Q. It was run before the stopes were started?

A. Necessarily.

Q. Then you would not recharge the expense of that to future development, would you?

(Testimony of J. C. Ralston.)

A. You would charge it to whatever you took out. If you are running to reach a stope you would charge it to that stope, I imagine.

Q. I understood your testimony was in the nature of the testimony of an expert,, or a man who is familiar with the cost of mining, and you were attempting to show that the ore in the Clark stopes could not be mined now, because of the expense of reaching it?

Mr. STOLL.—No, he does not testify that.

Q. Did I understand you correctly?

A. No, it was not in that sense. It was to show the cost, as I stated, at the time of taking out that specific shoot of ore,

Q. Do you mean in the past or future?

A. The cost to take it now, or possibly, if you please, some time past, or if you please, in the future.

Q. Then you think that you would count the cost of that 800 foot drift or level in estimating what it would cost from this time on to take out ore from those stopes?

A. Out of that particular shoot, yes, in this controverted ground.

Q. You would give no credit for the fact that the work was already done and paid for?

A. Well, there might be circumstances under which I would, surely. I have in view the fact of this controverted ground, Mr. Heyburn, you understand.

Q. If you were in charge of that mine to-morrow, and were considering the question as to whether you would resume operations on the Clark stopes and take out ore,

(Testimony of J. C. Ralston.)

would you be deterred from the fact that this 800 drift had cost a great of money, or would you be governed by the question as to whether or not from this time on you could work it to a profit? How is that?

A. Oh, I guess you are right about that.

Q. Now, you say there was no merchantable ore in the Clark stopes or in the stopes above the 800 foot level. Did I understand you correctly?

A. In the Clark stopes, I think that is what I stated.

Q. The stopes above the 800 foot level that you examined, all of them or either of them, was there any merchantable ore in either of them?

A. I saw none. There is ore in there which taken by itself would be merchantable, to be sure; but the expression "merchantable," as applied to the extraction of ore, no, I saw none in that respect.

Q. What do you call merchantable ore?

A. Ore of sufficient value and of sufficient quantity to warrant mining.

Q. What would be a sufficient quantity and quality of ore to warrant mining under existing conditions in the Clark stope?

A. I should base that answer upon what I found in that mine below, and it would be this. Possibly, with respect to value, fifteen or twenty per cent ore, and in width say twelve inches.

Q. That is about the limit, is it?

A. Well, that seems along those lines to have prevailed pretty generally below.

(Testimony of J. C. Ralston.)

Q. Have you had any experience in extracting ore and determining the question of whether it would pay or not? A. Not there.

Q. Anywhere? A. Yes, sir.

Q. Where?

A. In the State of Washington, for instance.

Q. In what mine? A. Various mines.

Q. Did the duty devolve upon you of determining whether the ore would pay to take out or not?

A. It did; yes, sir.

Q. In what mine? A. Well, a number of mines.

Q. Give me one of them, Mr. Ralston.

A. The Deer Trail mines, in Cedar Canyon, for instance, and several of the mines in the Republic Camp, if you please; and two mines I remember in British Columbia.

Q. Were any of them silver-lead mines?

A. Two of the mines carried lead, and two of them were silver mines; essentially, silver mines.

Q. They were not mined for lead-silver ores?

A. They were mined for silver ores, generally. The ore was largely silver.

Q. Did I understand you to make an estimate of the value of the ore in the Clark stope that would be represented by the void?

A. No. I made an estimate of what the shoot might contain.

Q. You say these samples you brought from the Clark stope are representative samples? If the Court should

(Testimony of J. C. Ralston.)

send a man there to bring samples from that mine, you say those are as fair samples as he could bring of the ore; that is, you have as good and as bad ore as there is in that stope, have you?

A. By virtue of the fact that those samples in every instance represent the full width of the vein as contained in each piece, I cannot conceive of any other conditions which would be more representative.

Q. Then, a test of the value of those samples, 1, 2, 3, and 4 that you have introduced here to-day, will be a fair test of the lead found as it is exposed in the Clark stope, will it? In case the Court sends somebody there to sample that ledge?

A. Well, I cannot say that. The greater the number of samples taken of a vein or stope, of course, the more satisfactory the result would be.

Q. You were present at the hearing of this case in the early part of January, in which the witnesses for the defendants testified that they had sampled the floor of the Clark and O'Neil stopes on the 800 foot level, were you not, and you knew that they had sampled the floor of those stopes?

A. I was present a part of that time, yes, and I heard some testimony given of values, and the like of that.

Q. And you knew they had been sampled; that is, that the defendants had sampled the floor of those stopes?

A. I do not recall that item.

Q. You heard Mr Wiard testify that he took those samples of thirty to thirty-six inches across the floor of

(Testimony of J. C. Ralston.)

the stope in the 800 foot level, in the Clark stope, did you not? A. Yes, sir.

Q. And give the results in lead and silver?

A. Yes, I think I did.

Q. Then, why didn't you, when you were up there last Friday, do the same thing?

A. Well, that was yesterday he testified.

Q. You heard him testify to that a month ago, didn't you, in the early part of January?

A. I am not sure about that, Mr. Heyburn. Perhaps I did.

Q. Why didn't you sample the floor of those stopes, when you were there?

A. Well, we were sampling; we brought into court here what we considered to be fair samples of a vein or a face which stood without contamination, which stood without a fall of degree, and the resultant conditions which obtained in the floor of any level. And if, in addition to that, we found a face forty feet high, I think a man, ordinarily, would be excused from digging under a floor if he found that in the face.

Q. Then, it is not a fact that you did not do it because you were not advised that the defendants had done it, was it? It was because, in your judgment, it was not necessary, wasn't it?

A. I say, frankly, Mr. Heyburn, that I have forgotten that Mr. Wiard did testify as to the floor. I had forgotten that he had testified, or that anybody had testified, as to any floor samples.

(Testimony of J. C. Ralston.)

Q. Was there any clean galena ore in the Clark stopes at any point exposed? A. Yes.

Q. Why didn't you bring some of it into court?

A. Because, in bringing a sample of this character, I believed I was bringing more of a representative sample than gouging out a little clean galena.

Q. You have not any doubt but that large piece of rock in the box is that corner that you saw and that you photographed, have you?

A. Oh, I haven't any reason to question it, Mr. Heyburn.

Q. Mr. Ralston, you do not want to be understood as saying that, in your opinion, between the time that piece of rock was taken down and the time you first saw it, some galena had been taken off that corner, do you?

A. Between the time I first saw it?

Q. Yes. A. First saw the corner, you mean?

Q. Yes, and the time that this was taken.

A. I don't know when this was taken, but I know this—that by whatever method, I do not pretend to say—I do know that that corner was not in the same shape when I saw it on the 20th of September as it was when I saw it at an earlier date.

Q. What earlier date? A. May, of last year.

Q. You saw it in May, and you say that it had been changed, or a change had been wrought in it, between that time and September?

A. Yes, sir, I saw it in May.

Q. Mr. Ralston, when you testified in this case in No-

(Testimony of J. C. Ralston.)

vember, you overlooked that, did you, that the corner had been changed; that the galena stayed there on three of those corners, clean galena?

A. I think not; I think some reference must have been made in my evidence to that.

Q. Those are freehand drawings, are they?

A. No, sir, they are to a scale.

Q. How many samples did you take on the east face of the Clark stope?

A. I brought into court, here—

Q. How many did you take, at all?

A. We have taken these four samples, here.

Q. Did you take any samples that you have not produced here? A. No, sir, not at that place.

Q. At how many points did you measure or pick into the face of the ledge on the east face of the Clark stope?

A. We did not pick into it any place.

Q. How many points did you measure?

A. We measured and estimated wherever we could see it.

Q. How many places did you measure, and how many places did you estimate?

A. Well, I made two definite measurements that I remember now. I could tell by referring to my notes.

Mr. STOLL.—Refer to your notes.

A. My notes are not here.

Mr. HEYBURN.—No, not while I am cross-examining.

Mr. STOLL.—We object to his talking at random

(Testimony of J. C. Ralston.)

about matters that can be made absolutely certain by his notes.

Mr. HEYBURN.—No. this was last Friday, only a few days ago.

Mr. STOLL.—I state to the witness that he is entitled to refer to his notes, if he wants to, and not to answer at random.

Mr. HEYBURN.—Not when I am examining him.

Q. Now, Mr. Ralston, how many points did you measure when you were there last Friday examining the width of the ledge as exposed on the east face of the Clark stope?

Mr. STOLL.—Where are your notes, Mr. Ralston?

A. At the office, my office.

Mr. STOLL.—If you cannot testify without those notes, you can say so.

Mr. HEYBURN.—I object to that statement of counsel to the witness. I want the witness' memory to something that occurred within a week.

Mr. STOLL.—For the purpose of trapping him, for the purpose of bringing into the case confusion, rather than to make certain that which can be easily made certain. Put that into the record. The general character of this defense has been right along those lines from start to finish.

Q. Mr. Ralston, answer that question. (The last question was read.)

(Testimony of J. C. Ralston.)

A. I cannot say, specifically, unless I refer to my notes.

Q. I want your recollection of it.

A. I reiterate what I just said, and supplement that by this, that my business is one in which I am making a great many records of measurements, and I would have to have a better memory than I have to segregate and keep fresh in mind all those sort of things, to answer you as specifically as I ought to.

Q. Give me your recollection, Mr. Ralston.

A. I say my recollection would have to be refreshed by reference to my notes.

Q. Have you any recollection on the subject, at all?

A. I have a recollection of making a number of measurements.

Q. Give me the benefit of it.

A. This is for the benefit of it.

Q. You say you have no recollection?

A. No, I say I have a distinct recollection of having done the work and having made a number of measurements.

Q. How many measurements did you make to determine the width of the ledge on the east face of the Clark stope?

Mr. STOLL.—That is objected to as having been answered fairly and squarely.

Q. (By Mr. STOLL.) Can you get your notes? Are they accessible where you can get them in a few moments?

(Testimony of J. C. Ralston.)

Mr. HEYBURN.—The witness cannot leave the witness stand while I am examining him.

Mr. STOLL.—Give your answer to my question, Mr. Ralston.

A. I can get them by going after them to my office, yes.

Mr. STOLL.—How far is your office away?

A. A block; it would take ten minutes, perhaps.

Mr. HEYBURN.—Well, the witness will not be excused.

Mr. STOLL.—If counsel wants to further examine this witness, we insist that he be permitted to get his notes.

Mr. HEYBURN.—I will not excuse the witness from the witness stand until I am through cross-examining him.

Q. Do you decline to answer that question any more specifically?

A. That is as specifically as I can intelligently answer it.

Q. If Mr. Stoll had not suggested to you that your notes not being here would be an excuse for not answering it, you would have answered these questions, would you not? A. I think not.

Q. You were getting along very nicely with your recollection. Now, Mr. Ralston, how many places did you measure the width of the ledge in the Clark stope on the roof of it, that is, on the top, to determine its width?

(Testimony of J. C. Ralston.)

A. The answer to that would be the same as the answer to the other.

Q. Give it to us.

A. Namely, that I desire to have reference to my notes.

Q. Have you any recollection on the subject?

A. I have a distinct recollection of having done the work and having made a number of measurements.

Q. Have you any recollection as to the number of measurements you have made?

A. Not specifically.

Q. Have you any recollection? A. I have.

Q. Give it to me.

A. I know that I made more than three, and I know that I made less than fifty, for instance.

Q. How many more than three did you make?

A. Oh, I don't pretend to say, unless I can see my notes.

Q. I will ask you the same question as to the measurements on the west face of the Clark stope. How many measurements did you make to determine the width of the ledge on that face?

A. My answer to that would be the same as my previous answer to the previous questions.

Q. What is the answer? I want it specifically.

A. Namely, that to answer that intelligently, I will have to have access to my notes.

Q. Have you any recollection as to the number of measurements you made on that west face?

(Testimony of J. C. Ralston.)

A. I have.

Q. Give it to me.

A. In the same way that I just spoke of a moment ago; namely, that I know there is more than two or three, and I know that there were less than thirty or forty.

Q. Do you think there were twenty of them?

A. I don't say.

Q. You will not say?

A. If I can see my notes, I can tell you, definitely.

Q. Now, on the east face of that stope how perpendicular is it? A. The east face of what stope?

Q. Of the Clark stope.

A. It is irregular in the roof.

Q. Can you climb up to it?

A. Climb up the face?

Q. Yes.

A. No, I think not. I had a great deal of trouble to climb from floor to floor in the center of the stope.

Q. There are no places against the east face, are there, that you can pass from one floor to another?

A. I think all the floors on the east face were right up against the rock, against the face; that is my recollection of it, now.

Q. Could you get at all parts of the east face from the floor to the top of the stope?

A. No, not at all parts.

Q. How high up could you go?

Q. You could get, no matter on what floor you

(Testimony of J. C. Ralston.)

started, you could always get to the roof, and on the floor of which you speak there is more or less accumulating matter.

Q. How many floors were on that face?

A. There were four.

Q. Three or four different floors?

A. That is my recollection.

Q. And that is all you were on on the east face, was it? A. That is my recollection of it, yes sir.

Q. You were on four floors on the east face of that stope? A. I say, that is my recollection of it.

Q. And on each of those floors you measured the width of the ledge?

A. I measured and estimated it wherever we saw it.

Q. And the same is true of the west face, is it? You were on four floors on the west face?

A. As I said, we did not get in on one floor on the west face. I remember that particularly, as that is shown on a drawing there.

Q. And could you reach the roof or top of this stope from the top floor all the way along? A. No.

Q. How did you get at it to measure the ledge up there? A. We estimated it.

Q. With the eye? A. With the eye.

Q. Did you pick into it? A. No, sir.

Q. You couldn't reach it with a pick, could you?

A. Oh, yes.

Q. Why didn't you pick into it?

A. It was not necessary, as I recognized it as the

(Testimony of J. C. Ralston.)

same bone or slab of ore that forks and stands out so strongly there that it could be seen without any picking.

Redirect Examination.

(By Mr. STOLL.)

Q. How much clean galena did you find in those stopes?

A. I could not say as to that. There were places where one would see a little spattering of clean galena at times.

Q. How did the showing of galena there compare with what you saw in the 1,200 the first time you were in the 1,200?

A. What part of the 1,200? The 1,200, generally?

Q. Yes.

A. Well, with respect to the width, there is no comparison, at all. To be sure, there are places in the 1,200 where perhaps the ore might be found to be as lean, but the general prevailing abundance of ore in the 1,200 is much greater and much better and much richer than anything we saw in those stopes. My judgment is, that in those Clark stopes the average values there, perhaps would not be over five per cent; so that the values below, I fancy, of course, are much higher.

Mr. STOLL.—There is a matter I forgot to call his attention to, which I will recall him for.

Q. Did you make an examination of the 1,600 in the Poorman?

A. We went into the 1,600, I think; when the party was there; but not on this last trip.

(Testimony of J. C. Ralston.)

Q. I mean the 1,700.

A. We entered the 1,700, yes.

Q. Did you hear Mr. Miller's testimony here to the effect that the 1,700 drift was no better showing than the Clark stopes?

A. I think I did.

Q. What is the fact as to that?

A. My recollection of Mr. Miller's testimony in that connection was that it was a general comparison, in which he stated that the indications in the 1,700, and the appearance of it was very poor, and instituted a comparison in some way with the Clark stopes. It struck me at the time—and I have this very distinct idea on the subject—that inasmuch as the Clark stopes reveal so small a bone or slab of ore or quartz in its face and back, and that on the 1,700, where the vein is shown for a width of 2 feet, at least, in the breast, and in the back, for a short distance out from the breast, that there was no comparison at all. And that also in that connection it seemed to me rather unhappily drawn in this, that the 1,700 breast was five or six hundred feet, probably away from this ground in question, away from a point vertically under the Clark stopes.

Recross-Examination.

Q. Did you raise any question as to that piece of rock being the corner as you saw it there last September?

A. No; not as I saw it in September.

Q. You do not raise any question on that?

A. Not on that date. You mean the date when we went in as a party?

(Testimony of J. C. Ralston.)

Q. Yes, in last September. A. Yes.

(Witness excused.)

Mr. HEYBURN.—I want to say, before you close, gentlemen, so that you may consider it between now and the next meeting, that I have drawn and will serve on you to-morrow, a petition, to the Judge, to select an engineer and assayer, and send them on the ground in controversy. who shall not be witnesses of either party, or an engineer from the Coeur d'Alene country, to determine as to whether or not the ore that is said to exist there by the witness, MacDonald, five or six feet of clean ore in the 1,200 foot level, is or is not there. I will notify you to be there on the 8th.

(Whereupon, an adjournment was taken herein until to-morrow morning at 10 o'clock, Saturday, February 1st, 1902.)

Spokane, Feb., 1, 1902, 10 o'clock A. M.

The parties met pursuant to adjournment, whereupon the following proceedings were had, to wit:

J. C. RALSTON, recalled on behalf of complainants, testified as follows:

Direct Examination.

(By Mr. STOLL.)

Q. Mr. Ralston, a notice has been served this morning by the defendants upon the complainants to the effect that they are going to apply to the Judge of this court, to appoint an engineer and assayer to make an examination of the 1,200 foot level, also the 800 foot lev-

(Testimony of J. C. Ralston.)

el, in the Ella and Missing Link claims, with a view of advising the Court, as to the size and extent of the ore bodies therein. State, please, whether there are any ore bodies left in the 1,200, and state generally its condition.

A. The main ore body of the 1,200 in the east drift has been all stoped out, so that whatever ore is left standing will be found now in the west face of the east drift, where it starts from the end of the crosscut; and the ore at that point would not be a measure of the prevailing width of the ore body east of there, as I found it and saw it at various times. The ore along the 1,200, from a point about seventy-one feet east of this crosscut has all been stoped out both above and below the 1,200, while the 1,200 itself is in swelling ground, and has pinched probably two feet, since I first saw it.

Q. How about the ore body under the point where the diamond drill penetrated the vein in the east end, diamond drill hole No. 2?

A. That body has been stoped out.

Q. Both above and below?

A. Above and below.

Q. How about the intermediate drift?

A. That has been stoped for some time.

Q. Above and below, both?

A. I cannot say immediately below. There may be a little ore standing there, but if it is, it is pretty close to the end line.

Q. Could an intelligent report be made by an engi-

(Testimony of J. C. Ralston.)

neer or assayer or a mining man, as to the amount of ore and its character, that was contained in that level, either at the time this suit was brought or during the latter part of the year 1899, and the forepart of the year 1900?

A. You mean, could an intelligent report be made as to the values at that time, and the extent and width?

Q. Yes.

A. Well, yes, along the 1,200, I think, an intelligent idea certainly could be arrived at as the ore stood there.

Mr. STOLL.—Read my question. (The question was read.)

Q. Could an intelligent report now be made?

A. No.

Q. By an engineer examining it now. Why not?

A. Because the ore is not there to be seen, and because the 1,200, as I said, is in swelling ground, or was in swelling ground at any rate.

Cross-Examination.

(By Mr. HEYBURN.)

Q. Mr. Ralston, did you see the intermediate drift before the stope was made above it?

A. I can't say. My recollection very distinctly is that it was stoped when I first saw it.

Q. It had been stoped years before, had it not?

A. I don't know how long. I know some stoping evidently had been done there, because there was shoot there.

Q. Did you see the east drift before it was stoped?

(Testimony of J. C. Ralston.)

A. I saw the east drift before any of the ore was stoped out of the 1,200 floor; yes, sir. And I saw the backs of the stopes as they were progressing, and as they had broken through into the 1,200.

Q. When did you see the east drift first?

A. I would have to refer to my last year's diary to tell you that.

Q. In what year was it?

A. I saw it last year.

Q. And it had not been stoped then?

A. It certainly had not been, because they had broken through, opened only a few feet, when we as a party examined the mine in September.

Q. I refer to the stope above the east drift.

A. Yes, sir.

Q. Did you ever see the east drift before the stopes rising from it were made?

A. Well, I don't know to what height the stopes were when I first saw the east drift, no.

Q. But they had been practically stoped up there?

A. There was stoping evidently going on up above there, taking ore out of there and out of those shoots, as I recollect it now.

Q. What stoping has been done on the 1,200 foot level in this ground in controversy since you first saw it?

A. I don't know, I am sure.

Q. With regard to the quantity of the stoping?

A. My idea of that is that there probably has been a

(Testimony of J. C. Ralston.)

quarter of the stopes taken out since I first saw that mine.

Q. (Direct.) That is above the 1,200?

A. Above the 1,200.

Q. And whatever was taken out, it was already stoped up a considerable distance when you first saw it?

A. There was some stoping, I suppose.

Q. Has there been any new stoping started up above the 1,200, on this ground in controversy, since you first saw it? Any stoping started from the roof or top of the drifts?

A. From the top of the 1,200?

Q. Yes? A. No, I think not.

Q. Then, it had all been stoped up some distance when you first saw it?

A. Possibly. Not all of it, no; but there were some stopes.

Q. What part of it?

A. As I said before, that part of it lying east of a point about 71 feet from the beginning of the east drift.

Q. Has that all been done since you first saw it?

A. Oh, I do not know when that was done. That has been done probably before. Some of it at least.

Q. Had it not all been done before?

A. I do not know that it had.

Q. Don't you know all the stoping was done, that has been done at all, on the 1,200, before you ever went in there?

A. No; I do not know that definitely.

Q. Is it true? A. I don't know.

Q. Do you know of any stoping being done on the

(Testimony of J. C. Ralston.)

1,200 in this ground in controversy since you first went there? A. My impression is there has been some.

Q. Where? A. Above the 1,200.

Q. At what point?

A. Along between the east end line of the Ella and the seventy-one feet, which I mentioned.

Q. Did you see it being done?

A. I did not.

Q. What did you see that makes you think it was done?

A. My recollection is that I saw ore coming down, being taken out of those shoots, and my inference was—

Q. (Interrupting.) You did not go up in the stopes?

A. Not at the early dates, no.

Q. Not at that time? A. No.

Q. Then the stopes are now, so far as you know, in the same condition that they were at the time you went in there, are they not, above the 1,200?

A. Well, not wholly.

Q. State where they are not. I want the exact condition.

A. My impression is that they were not, by virtue, amongst other things, of that swelling ground.

Q. I do not mean the physical change. I mean so far as stoping is concerned.

A. That I cannot answer definitely.

Q. If you do not know to the contrary, what would you base any other conclusion on? If you do not know anything upon which to base a conclusion that the

(Testimony of J. C. Ralston.)

work was done, why do you hesitate to say that no work has been done, to your knowledge?

A. I stated a moment ago on that, very specifically, what I thought about that.

Q. I do not think you have. I will ask you the question. A. Perhaps, I am obtuse on the matter.

Q. Has there been any stoping done in the stopes above the 1,200 since you first went into those stopes?

A. I do not know.

Q. Why do you say—you claim to make an intelligent report on it, do you not?

A. Trying to; yes.

Q. Why did you say in answer to Mr. Stoll's question, or why did you change your testimony? You said first a man could make an intelligent report, and then on a suggestion or an intimation from counsel you said he could not? A. Not at all.

Q. Why do you say a man could not make as intelligent a report as you have made on it, if the conditions have not changed?

A. Well, as I stated before, that ground is swelling. Now, if a man goes in there to determine the width of that ore body, or the probable width of it when it existed, and finds that ground, to-day, swelling to the extent of two feet, I cannot imagine that he could make an intelligent report of it.

Q. You are making it on that basis, are you not?

A. No, sir. I am making it on the basis of what I

(Testimony of J. C. Ralston.)

saw before the ore was taken out, immediately under the 1,200.

Q. But the swelling above would not affect it immediately under it, would it?

A. The whole region of swelling may extend some distance you know.

Q. Mr. Ralston, have the timbers in the floor of the 1,200 under that stope been crushed at all?

A. They have along the 1,200?

Q. Above it, but have they below, below where the stope comes up to the 1,200, over the 1,300?

A. When I was in there I did not see any timbers. They were knocking out the ore; but below that—

Q. (Interrupting.) Don't you know there has been no pressure or closing up of that stope below the 1,200 floor?

A. No, sir; I do not.

Q. It did not occur to you to look at that, did it? Now, Mr. Ralston, I want to ask you something in regard to the ore at the intermediate crosscut. Did you ever see five or six feet of clean galena ore in the vein or stringer that was cut at the intermediate crosscut, or where the crosscut intersects the intermediate drift?

A. I saw the intermediate drift, and when I first saw it, I saw ore in three corners.

Q. You still stick to that, do you?

A. I certainly do.

Q. You said you saw clean galena ore in three corners when you were first examined?

A. Yes.

Q. You still stick to that?

(Testimony of J. C. Ralston.)

A. I reiterate what I said previously.

Q. Have you examined the floor of that intermediate drift where it intersects the crosscut, to see whether there is any ore there at all? A. No, sir.

Q. You did not examine that?

A. I did not examine the floor.

Q. Did it occur to you as a mining engineer that that would be the place to examine it to determine what they found, on the floor, at least, of the crosscut?

A. If I were making a complete examination I would expect to do that.

Q. Why would you not make a complete examination to prepare yourself to testify to the facts in this case?

A. Because I was refused admission to the mine to do that very thing.

Q. When?

A. When I went up there for the purpose of doing it.

Q. You went there under the order of the Court, didn't you? A. I did.

Q. Who refused you permission to do that particular thing? A. Mr. Miller.

Q. Nobody curtailed your stay there, did they?

A. I was there on my first visit, for I think, perhaps, two days, and that was as long as I could possibly stay there at that time, and so notified your Mr. Miller that I would like to return and complete the work I had left incomplete.

(Testimony of J. C. Ralston.)

Q. And that was the work you wanted to complete?

A. I wanted to make a good deal of additional observations.

Q. Was this the work you wanted to complete, the observation of the floor of that drift?

A. That amongst other things; yes, sir.

Q. How often have you been there to examine that mine on the 1,200 foot level?

A. Oh, three or four times; three times or four times, possibly.

Q. How many days altogether?

A. Four or five days possibly.

Q. Four or five days altogether. Did Mr. Miller or yourself ever refer to doing this work at the intersection of the intermediate drift and the crosscut, ever talk about it?

A. No, there was no more reference made to that specific point than to any other point that I had in mind.

Q. Did Mr. Miller ever tell you that you could not make exploration or examination there?

A. Oh, no.

Q. Well, I say to you now, that you can do it if you want to, if you want to make an examination of that work. Do you?

Mr. STOLL.—After the case is tried and we are ready to rest is a pretty time to tender us that privilege, to become so generous and liberal in your offers.

Q. Why didn't you examine it last Friday when you were there, a week ago yesterday?

(Testimony of J. C. Ralston.)

A. I did not have the time.

Q. Why did you not take the time?

A. Because the trial was too close at hand.

Q. How long would it take you to examine a space ten feet long, at the intersection of the drift?

A. Well, we would want to dig a trench, of course.

Q. How long would that take?

A. I should want to take a day to it.

Q. Would you do that digging, yourself, or have it done? A. I would have it done.

Q. It would take a day to dig a trench? Why didn't you take a day?

A. As I say, I did not have the time; the trial was at hand, and we wanted to prepare some little matters.

Q. Did you make any attempt to do it, at all?

A. I did not make any attempt, because it was my purpose to complete my examination at the earlier date, at the time, as I say, when I was refused admission.

Q. I want to know a little more about that refusal of admission. Tell me when that was, and what was said, and we will see whether it amounts to a refusal or not.

Mr. STOLL.—We object to that, because we went into it in our case in chief, and the defendants have not attempted to deny it in their case. Three witnesses, Mr. MacDonald, Mr. Ralston and James Porter, testified to it. And Ralston, Porter and MacDonald were all three denied admission, and no attempt was made by the de-

(Testimony of J. C. Ralston.)

endants to deny any part of it. I state that as my recollection of the testimony.

Q. Go ahead, Mr. Ralston.

A. I cannot give you the details as fully and completely now as I did in the examination in chief; but my recollection is that when I applied for admission, when I called Mr. Miller up by telephone, from Wardner, where I was, I stated that I desired to return again to the mine to complete that work which I had left incomplete, and he stated that he would be compelled to refuse me admission to the mine, under advice from his attorney.

Q. Did he give you any reason for it?

A. No, none other than that.

Q. Where was Mr. Miller at that time?

A. I have forgotten whether he was in Wallace or Wardner. I think he was in Wallace.

Q. And you were at Wardner?

A. I was at Wardner.

Q. You never went to the mine and was refused admission there?

A. Yes, I was refused admission at the mine, I think.

Q. When?

A. I cannot give you the dates, unless I can refer to my notes.

Q. I would like to know the dates.

A. By referring to my evidence, I can give it to you.

Q. No, I want your memory, your recollection.

(Testimony of J. C. Ralston.)

Mr. STOLL.—If the witness has no memory on it, and says so, he cannot be expected to give it.

Mr. HEYBURN.—We will hear what the witness has to say about that.

A. There were a number of dates there in connection with those visits, Mr. Heyburn, and I might give you the wrong date, and therefore I say that I prefer to refresh my memory by reference either to my diary or to the examination.

Q. Were you refused admission to that mine, at the mine, on making application there, at any time?

A. I think I was.

Q. Were you, or were you not?

A. I cannot state now. That has all been set out in my testimony.

Q. I know, but I am not bound by your testimony, at all. Your attorney might be, but I am not. I want to know whether you were, or were not, refused admission?

(Objected to as improper cross-examination.)

Q. Well, Mr. Ralston, have you thought out whether or not you were refused at the mine the privilege of entering?

A. I cannot recall specifically whether I was refused at the mine or not. I know I was given that refusal as I outlined it before.

Q. That was all there was of it, a telephone refusal?

A. Well, there was a refusal. I remember, when I

(Testimony of J. C. Ralston.)

took Mr. Fassett up there to assist me, Mr. Fassett was refused at the mine. I remember that, distinctly.

Q. You were not refused, were you?

A. Not at that time.

Q. You were simply told that Mr. Fassett was not included within the order for admission, were you not?

A. I don't remember the words used by Mr. Miller, but it resulted in a refusal to allow Mr. Fassett to accompany me, as my assistant, there.

Q. Mr. Ralston, you have been in the mine several times since this alleged refusal, haven't you?

A. I have been in the mine once since.

Q. You have not applied to go in any oftener, have you?

A. No.

Q. On the occasion of your last visit, you went in there and stayed as long as you chose; there was no limitation placed on you, at all, was there?

A. None.

Q. Now, did you ever see five feet of clean galena ore in the crosscut, at or about its intersection with the east drift?

A. I saw, what I have stated so many times before, Mr. Heyburn, galena standing on those three walls.

Q. I am speaking of the inside drift, now, the east drift?

A. Oh, the main east drift of the 1,200?

Q. Yes.

A. Now, repeat that question. (The question was read and the witness continued.) No.

(Testimony of J. C. Ralston.)

Q. How much galena ore have you ever seen in that crosscut, at any point; solid, consecutive galena ore, in width?

(Objected to as improper cross-examination.)

A. Now, you mean the crosscut entering into the south drift?

Q. Yes.

A. When I say I saw galena ore standing on the three corners, I think that that must surely cover the proposition. I cannot say how many feet there would be there when the thing is stoped out and taken out.

Q. I want to know how much the largest body of galena ore you ever saw at any point would be. I do not mean how much void you saw between two pieces of galena, but I want to know the largest body of galena ore you ever saw in that crosscut?

A. Well, the bodies of ore which I saw standing on both corners, I can't say as to how wide they were. I saw them standing there. But their depth into the wall, of course, I could not say. They may extend one inch or two inches, or five feet.

Q. I want your judgment. You have testified here as a mining engineer, capable of telling. I want your judgment on it, so that the engineer to be sent there by the Court may check it up on your testimony?

A. Well, sir, I have not the occult ability to see into a wall of ore, nor has any engineer. If I see a face of ore there, I see that, but I do not see into it, and, as I

(Testimony of J. C. Ralston.)

say, I could not tell you whether it was one inch deep or five feet.

Q. You are not willing, then, to say how much galena ore you saw there in width, at any point in that crosscut?

A. I say that is a physical impossibility to answer.

Q. Mr. Ralston, how about the right-hand wall of that drift. It is only broken in one place, is it not, during its entire length, and that is at the intermediate crosscut?

A. Yes, sir.

Q. Did you see any evidence of any bodies of solid galena, or clean galena ore, at any point along that right-hand side of the crosscut?

I saw evidences of mineralization extending through from that intermediate on to the end of the crosscut.

Q. To what extent does that mineralization exist? What did it amount to, in the way of ore?

A. It did not amount to much ore.

Q. Would not pay to work under any known process, would it?

A. Between the intermediate and—

Q. At any point? I will give you your choice; take the best point, then I will ask you about the size of it, afterwards.

A. I say there was only mineralization outside, beyond the drift, either north or south.

Q. No ore, at all?

A. I should not call it much ore there.

Q. You saw the streak of ore that was in the right-hand side opposite the mouth of the east drift; didn't

(Testimony of J. C. Ralston.)

you? The piece which was in evidence here a day or two ago; you saw that ore, there?

A. This big piece of ore you brought down?

Q. The piece about six or seven inches in width, there. You saw that, didn't you? A. I don't remember.

Q. It is the west breast of the east drift?

A. I don't remember having seen that.

Q. Did you see any ore there in the mine at the west breast of the east drift? A. Yes.

Q. How much? About four feet of it, clean ore?

A. Oh, no; I think there was about from six to twelve inches of ore in there.

Q. It showed at the top of the side of the drift, opposite the west; that is, opposite the east drift, did it not? A. It showed all the way down.

Q. Clear to the floor? A. Yes.

Q. Of what width? A. Of varying widths.

Q. But of what width was it at the bottom, or near the bottom?

A. Near the bottom, my recollection is it was about twelve inches.

Q. How wide was it at the top?

A. Well, it was perhaps eight or ten inches wide, or perhaps only six inches in width.

Q. That is what this engineer will find when he goes there is it?

A. Yes, sir; I gave the figures here yesterday, showing that very width.

Q. Now, about the top of that drift: Did that extend

(Testimony of J. C. Ralston.)

clear across the top of the drift into the east drift; that is, clear across the top of the crosscut into the east drift?

A. It continued all along the east drift.

Q. Of that width? A. Of varying width.

Q. That has not been disturbed, the top of that drift, for the first seventy-eight feet; that is a fact, is it not?

A. I imagine that is a fact.

Q. Now, will an engineer find a streak of ore extending the entire length, from the crosscut into the point where the stope commences, of seven or eight inches of clean galena, if he goes there?

A. Well, I don't know what he will average it up as being. He will find a streak of ore.

Q. Continuous?

A. A mineralized matter, mineralized rock, vein stuff, all the way in, very clearly defined.

Q. How much ore will he find?

A. I cannot tell you how much he will find.

Q. How much did you find?

A. I found a streak varying in width from six inches until it finally widened out to a width sufficient to stope.

Q. Is six inches the minimum width of that streak?

A. Oh, I fancy you could go there, if you desired, Mr. Heyburn, and find streaks perhaps not wider than your finger, possibly no streaks, at all, if you went at it to find your regular cross-sections.

Q. How many feet of ore of a streak will he find, six inches or more in width?

A. I would not pretend to say.

(Testimony of J. C. Ralston.)

Q. Half the length of that seventy-five or eighty feet?

A. I would not pretend to say as to that.

Q. Will he find ten feet six inches wide?

A. Oh, he will doubtless find ten feet.

Q. Would you raise that length any above ten feet?

A. Well, now, I have not made specific notes on that, and I cannot tell you.

Redirect Examination.

(By Mr. STOLL.)

Q. Is the floor of that east drift on the 1,200 in the condition now that it was in when you examined it?

A. It has all been stoped out.

Q. What condition was it in when you examined it?

A. The first time I saw it, it had not been touched; it had a car-track through there.

Q. It is stoped clear down to the 1,300 now, is it?

A. Yes, sir.

Recross-Examination.

Q. It has not been stoped, at all, along the first seventy-four feet, has it? A. No.

Q. Then, you can examine the floor or roof along the first seventy-five feet of the east drift?

A. I stated that very specifically; but the point where the stope begins, on eastward, it is all taken out.

Q. There is plenty of opportunity to examine both the floor and the top of the east drift for the first seventy-five feet, is there not?

A. For that seventy-one or seventy-five feet, or that

(Testimony of W. S. Norman.)

part of the vein which apparently is too narrow to mine or to stope, yes, certainly; but no place else.

(Witness excused.)

W. S. NORMAN, being recalled on behalf of the complainants, testified as follows.

Direct Examination.

(By Mr. STOLL.)

Q. You are the president of the Hotel Spokane Company? A. Yes, sir.

Q. Did you keep a register of arrivals during the year 1899? A. Yes, sir.

Q. In October? A. In October.

Q. Turn to the 12th of October, and see if you have among your arrivals at that time Edwin Packard?

A. Yes, sir.

Q. Do you know Mr. Packard's handwriting?

A. Very well.

Q. Is it in his handwriting? A. Yes, sir.

Q. When did he arrive at the Hotel Spokane?

A. He arrived in the morning of October 12th.

Q. How long did he remain?

A. He remained until the morning of the 16th.

Q. Of what month and what year is that?

A. The month of October, 1899.

Q. How long was he away?

A. He left on the morning train on the 16th, and came back—

Q. I don't care for that. That is all.

(Witness excused without cross-examination.)

JAMES P. HARVEY, being recalled on behalf of complainants, testified as follows:

Direct Examination.

(By Mr. STOLL.)

Q. Mr. Harvey, did you accompany Mr. Ralston to Burke on the 25th of January, 1902, to make an examination of the Clark stopes? A. Yes, sir.

Q. After the testimony was partially on the part of the defendants? A. Yes, sir.

Q. How much experience have you had in mining, Mr. Harvey? A. Sixteen or *seven* years.

Q. You were at one time foreman of the company that operated the Poorman mine, which is one of the group of the defendant companies? A. Yes, sir.

Q. Now state what you did upon that examination.

A. We went into the 1,100, went up the raise from the eleven to the eight and into the Clark stope and O'Neil stopes on the 800 to the east and back down again.

Q. State what examination you made there?

A. In going—I have some notes here—on the 16th floor in that raise, which would be about 140 feet from the eleven—no, east stope of that raise, I think that is the end of the No. 2 stope or chute in that ground. The No. 3 chute is farther to the east and I think ten or twelve feet into the hanging side of this place. The twenty-first floor, east side of the raise, or the Ella side, showed from one to three inches of quartz and lead mixed. The twenty-fifth floor, or two floors under the 800 about, there was no ore on the east side of the raise, or the Ella side, which raise runs up practically on

(Testimony of James P. Harvey.)

the line, part of it on the Poorman and part of it on the Ella. I might state that that is what Mr. Gus Smith, the engineer for the defendants in this suit, told us at the time. On the west side of the raise where it holes into the floor of the 800-foot level the ore shown at that point is the size of a piece marked sample No. 4. Mr. Ralston and I took that sample.

Q. How big was it?

A. Well, I should judge an inch and a half wide. We went up in the Clark stopes, and in the face of the third floor, on the west side of the Clark stopes, we took sample No. 1, which was two inches wide there, the hard bone of ore.

Q. That is, the width of the ore body there?

A. That is the width of the ore seam, yes. The vein is wider; probably thirty inches of vein matter enclosing this ore; but that is the ore two inches wide. On the floor below that sample I made a memorandum, estimated that it is not over six inches wide below where that sample was taken, and above that sample, opened up from two inches until within about a foot of the back it opened out in a bunch of eighteen inches. Going up to the fourth floor the fourth floor east face, ore not over six inches in small streak. West side of fourth floor; west side about five inches wide down to two feet from the floor of the fourth stope, and there it shows a bunch of eighteen inches, where it runs down into No. 3 floor. Ore on the roof of fourth floor, west

(Testimony of James P. Harvey.)

side, about six feet back from the west face cuts out; that is, narrows down to practically a seam. I estimated the average width of the ore along the roof of the Clark stope to be about six inches. Sample No. 2 which Mr. Ralston and I took is out of the group near the east face.

Q. That is in evidence here in Mr. Ralston's testimony, is it not, as an exhibit?

A. Yes, sir. Down on the second floor, on the east side of the Clark stope we took another sample four inches wide, which was the width of the ore seam, and called that sample No. 3. We went from there up to the O'Neil stope, went up on the fourth floor, and the west face of it looks freshly broken; whether caved or mined I would not pretend to say, but freshly broken.

Q. How much ore was there at that point?

A. I do not just remember now; six or eight or ten inches, or something of that kind. I did not make much of an examination of the O'Neil for the reason I did not consider them in the ground in controversy.

Q. You assisted Mr. Ralston to make a measurement, and you made that determination there, did you?

A. Yes, I measured up with Mr. Ralston from the Ella raise to determine the Ella lines, and from there we went home.

Q. What do you say, Mr. Harvey, as to whether or not there is shown there what might be termed merchantable ore, considering the conditions, surroundings and the place where it is found?

(Testimony of James P. Harvey.)

A. No, sir, it is not merchantable ore; that is, the streak might be, but in order to work a six-inch streak of ore you would have to take a stope four to four and a half feet wide, and when we came back Mr. Ralston and I calculated the thing from there to the six hundred, and I think it showed 270 tons of ore in this six-inch streak, between that point and the 600. I think we figured that, allowing liberal construction of what that would average, fifteen per cent, and seven ounces in silver, and it shows 270 tons of that kind of ore between the eight and six. In order to get that 270 tons of ore you would have to take out four to four and a half feet wide, and we figured it four feet, which would make 1,800 tons total. The value of that 270 tons of ore, figured as I said before at four dollars for lead and sixty cents an ounce for silver would give a total of between \$4,050 and \$4,060; and the cost of extracting that 1,800 tons of ore at three dollars a ton would be \$5,400. It would not be profitable to work it.

Q. Mr. Culbertson testified that he had a conversation with you at Wallace in the year 1899. Do you remember the time he testified about that?

A. He said it was in the spring.

Q. In which you offered to sell him your interest in the Ella. State if that is true?

A. No, sir. I was not in the Coeur d'Alene country in 1899, and I never offered Mr. Culbertson nor anybody else my interest in the Ella for any consideration whatever until Mr. Clark spoke to me about it on this deal.

(Testimony of James P. Harvey.)

Q. State where you were during the year 1899, and what you were engaged at?

A. I was in the Republic camp, manager or superintendent of the Republic and several other mines there until July 1st. I was in Spokane I think twice from the first of January to the first of July, but not in the Coeur d'Alenes however, but was on business connected with the Republic and the various properties I was running there. On the first day of July I left here and went east and did not return from the east until the 20th day of August. On the 20th day of August I left here and went down to Leavenworth, this State, to look at some mines for Mr. Patrick Clark and returned on the 26th of August. On my return from that trip I went to Mr. Clark's office, and he told me that Mr. Culbertson had been in his office and told him—

Mr. HEYBURN.—I object to that as being hearsay and incompetent testimony.

Q. Go ahead.

A. —and told him that they had drifted in on the 1,200 on the Ella and it did not amount to anything, and that he was short Jim Clark's twentieth in the agreement that we had made, and he looked to him to have it given to him. He said he was selling out for \$500.

Q. (Cross.) That is what Clark said?

A. Clark said that Mr. Culbertson had told him.

Mr. HEYBURN.—I object to this as incompetent and hearsay testimony.

(Testimony of James P. Harvey.)

A. (Continuing.) On the first of September I went to Republic.

Q. Were you present when the samples which Mr. Ralston has put in evidence here in connection with his testimony were taken? A. Yes, sir.

Q. State whether they were representative samples of the ore bodies which you found there?

A. They were taken clean across all the ore in that seam.

Cross-Examination.

(By Mr. HEYBURN.)

Q. Mr. Harvey, you spoke of examining the west face of the O'Neil stope. You say there was about how much ore there? About a foot of galena ore exposed there?

A. I don't remember. From six inches, or something like that. I did not make any specific notes of the O'Neil, because I did not consider they were in Ella ground or the ground in dispute.

Q. You saw this map Mr. Ralston introduced yesterday? A. Yes, sir.

Q. Does that face of the O'Neill stope appear to be in the ground in dispute?

A. It does up here, but not down where the stope starts.

Q. What about the portion that is shown to be in Ella ground marked Plaintiff's Exhibit No. 43?

(Testimony of James P. Harvey.)

Mr. STOLL.—That is the portion that has been broken off fresh since.

Q. I asked you what appeared to be there in the way of ore?

(Objected to as improper cross-examination.)

A. Oh, it continued up about the same as the Clark stopes, five, six, four, and in some places widened out to ten inches and so on.

Q. Of pretty good ore? A. Yes.

Q. The same kind of ore that you milled from there when you were working the Clark stopes? A. Yes.

Q. You had charge of the work in the Clark stopes and the O'Neil stopes as manager, did you not?

A. As superintendent, yes.

Q. You stoped whatever ore was taken out of there yourself? A. The men did under my direction.

Q. Your judgment controlled as to whether it would pay to work or whether they should stope it or not, did it not? A. No, sir, facts.

Q. What? A. Well, facts and judgment.

Q. You determined the facts? A. Yes.

Q. That is, you did not have to get permission of anybody to say whether you would work that ore or not?

A. No, sir.

Q. You were the boss of that work? A. Yes.

Q. You say that the ore that you saw there the other day, last Friday, averaged about the same as the ore that you worked from those stopes? A. Yes, sir.

(Testimony of James P. Harvey.)

Mr. STOLL.—For my own advisement, do you mean as to size or quality?

Mr. HEYBURN.—Wait until I am through cross-examining him, except as to explanatory questions. I will turn him over to you in a minute.

The WITNESS.—As I have stated in my former testimony, it did not pay to work that ground, and that was the reason we quit.

Q. Were you present when the deed of James Clark and wife was made to Culbertson at the time you spoke of being in Patrick Clark's office? A. No.

Q. What year did you mean to be understood that you were not in the Coeur d'Alenes in August?

A. 1899.

(Witness excused.)

Mr. STOLL.—We will rest.

Complainants rest.

SURREBUTTAL.

W. CLAYTON MILLER, recalled on part of defendants, testified as follows:

Direct Examination.

(By Mr. HEYBURN.)

Mr. STOLL.—On what theory are you going to recall any more witnesses?

Mr. HEYBURN.—I am going to rebut the testimony your witnesses have just been giving.

(Testimony of W. C. Ross Miller.)

Mr. STOLL.—We object to their calling any further witnesses, the case having closed upon our rebuttal.

Mr. HEYBURN.—This is surrebuttal.

Q. Mr. Miller, you heard Mr. Ralston just testify as to finding ore on three corners at the intermediate drift, and his suggestion that there had been a change there from the time he first saw the property until the time he recently saw it. State whether or not any work has been done that has removed anything, or changed those corners, with the exception of the pieces of ore that were brought into court here, since it was made?

Mr. STOLL.—That is objected to as improper surrebuttal; it was a part of our main case, and was never touched upon by the defendants in their case.

A. Mr. Ralston, I believe, saw it first about May when he was there unofficially. At that time I was in charge of the property. Since that time up to the present time, there has been no mining of any description done at this point, at the intersection of the 1,200 cross cut with the intermediate drift, or any of its corners, either above or below this intersecting point. There has been a little picking by witnesses examining it; but the only pieces of rock broken down to my knowledge or to my recollection, or any change noted by me during the many times I have been there, has been some large pieces broken down in my presence about ten days ago, including the piece brought into court from the southwest corner of the intersection. And further, I have

(Testimony of W. Clayton Miller.)

never seen on any of the corners any solid galena ore or any ore at all except on the southwest corner, where there is a slightly mineralized horse between the two small ore seams.

Q. A slightly mineralized horse?

A. A slightly mineralized horse, between the two small ore seams found, one in the intermediate drift on the foot wall side thereof, in the bottom, about six inches wide, of good ore; and another about eight inches in width, twenty-two to twenty-three feet south of this seam found in the south drift to the east, and being a split, around and in between which this horse is.

Q. Mr. Miller, you heard Mr. Ralston testify a few minutes ago that you refused to allow him and some others to enter this ground for the purpose of inspection, saying that he called you up on the telephone and you told him you were advised that he could not enter. Will you state, please, what the facts are in regard to that matter?

Mr. STOLL.—That is objected to as not proper rebuttal; it was introduced in chief by complainants, and never touched upon by the defense, and only drawn from our witness by cross-examination in rebuttal.

A. The first time that the party, as they call it, came up there, at the time Mr. MacDonald accompanied them—

Mr. STOLL.—We object to this as not proper rebuttal, and no denial of anything, but an attempt to go into the defense in an affirmative way.

(Testimony of W. Clayton Miller.)

Q. I don't want you to go into anything except the time he referred to.

A. I am explaining about the telephone conversation. They entered the mine and any portions thereof within the ground in controversy they desired, and stayed as long as they chose. On coming out there was a conversation to the effect that Mr. Ralston would desire to come back at some future time, some one future visit, to finish up his then unfinished examination and measurements, of whatever else he chose to do. When I say he himself, I mean of course his party who were there at the time. At the time of the second visit, at the time Mr. Fassett arrived on the scene, inasmuch as they were not included in the list first given me of the number of witnesses and engineers, etc., I told him anybody included in the original list of experts or witnesses or assistants were at liberty to go underground, which they did, of those who were present, excepting Mr. Fassett, who on advice—

Mr. STOLL.—Whose advice?

Mr. HEYBURN.—My advice.

A. Mr. Heyburn's advice; and then supposing that the engineering portion of the examination was over—

Mr. STOLL.—We object to what he supposes.

A. Supposing from the talk—

Mr. STOLL.—We object to the witness supposing from anything, the testimony should be of facts, and not suppositions.

(Testimony of W. Clayton Miller.)

Q. Go, on, Mr. Miller.

A. And on some later occasion, I have forgotten the date, when Mr. Ralston was down at the Bunkerhill from Wardner, he called me up about going underground. And before giving him an answer—I think that was in Mr. Heyburn's office in Wallace, when I was called up—and I told him that that portion of the examination was closed, but that Mr. Harvey, the company representative, could go, of course, underground at his pleasure, upon proper notice. But that was the terms of the order as I understood it.

Q. They have gone underground since freely, have they not?

A. They have never asked to go underground but once since, and that was the other day when they met me in Wallace, and asked me to go underground. I asked them where they wanted to go, and they named certain places. I wrote out an order and gave it to Mr. Harvey, in Mr. Ralston's presence to take up to the foreman, and I understand they went to those places, and they were not limited to time or anything else.

Cross-Examination.

(By Mr. STOLL.)

Q. What places in the mine did you tell them they could go last Friday?

A. I asked Mr. Harvey where he wanted to go. He said he wanted to go into the eight from the eleven, and wanted to go on the seventeen, inasmuch as some testi-

(Testimony of Charles S. Eltinge.)

suppose they were canceled in the office, but I would not swear to it.

Q. At the time they bear date?

A. I presume so.

Q. In your office? A. I presume they were.

Q. That is your signature witnessing the signature to the deed, is it?

A. That is my signature; yes.

Q. You did not write any of the balance or body of that deed, did you, except the name "Charlotte" and your signature. It is Mr. Culbertson's handwriting, is it not? A. It looks like it, yes.

Q. You wrote the word "Charlotte," the first name of Mr. Clark's wife, near the top of the deed in the second line?

A. That looks like my handwriting.

Cross-Examination.

(By Mr. STOLL.)

Q. Where is James Clark, the only person who could possibly explain the circumstances of this deed?

A. He is dead, I think.

Q. When did he die?

A. Last summer, some time, in July or August.

(Witness excused.)

F. R. CULBERTSON, recalled on part of defendants, testified as follows:

(Testimony of F. R. Culbertson.)

Direct Examination.

(By Mr. HEYBURN.)

Q. Mr. Culbertson, examine this document, a deed from James Clark and wife, to yourself, and state who wrote it.

Mr. STOLL.—That is objected to as improper rebuttal. This witness was on before to the same point on the defense, and this is not proper surrebuttal.

A. At the time I wrote my letter of August 25th to Patrick Clark, I stated in that letter—

Mr. STOLL.—We object to the answer as not responsive to the question.

A. (Continuing.)—that I was short Jim's deed, Jim Clark's deed; that if it had been delivered to me it had been either lost or destroyed. I said in that letter that I had made off a deed for Jim to sign—

Mr. STOLL.—We object to this speech, as being in response to no question propounded to the witness, and improper rebuttal.

A. (Continuing.) This is a matter of veracity—considerable veracity between Mr. Clark and myself. I propose to prove—

Mr. STOLL.—We object to these statements.

A. (Continuing.)—that I have got the documentary evidence here to prove that I am right and that Mr. Clark is wrong.

Mr. STOLL.—I object to the argument made by the

(Testimony of F. R. Culbertson.)

witness in attempting to establish his veracity. His statements are self-serving declarations.

A. (Continuing.) If I had got the deeds from Mr. Clark on the 22d or the 23d, as he stated, I naturally at that time would have sent that deed, which he says he handed to me in his office, down with the other deeds of Patrick Clark, Mr. Kingsbury and James Harvey. Three deeds were sent down by me on the 25th of August from Burke to the recorder to be recorded.

Mr. STOLL.—I object to this as being an argument of the witness, who is not of counsel in the case, and so far as we are advised he is not admitted to the bar, and we move to strike it out.

A. (Continuing.) As I stated before, Mr. Clark made some statements here that he cannot bear out on the evidence.

Mr. STOLL.—I move to strike that out as not responsive to any question. And I object to this witness being turned in here to travel over all sorts of territory with a rambling speech.

A. (Continuing.) It is self-evident to anybody that if I had had Jim Clark's deed on the 22d or the 23d, I would have sent it down on the 25th at the same time I sent these other three deeds down.

Mr. STOLL.—I move to strike that all out.

A. (Continuing.) These other three deeds show that they were recorded on the 23d day of August at Wallace, Idaho.

(Testimony of F. R. Culbertson.)

Mr. STOLL.—That is objected to as improper rebuttal, and we move to strike it out.

A. (Continuing.) If you will refer to the letter I wrote on the 25th of August to Mr. Clark, you will see that I asked Mr. Clark to supply Mrs. Jim Clark's first name, that I did not know it.

Mr. STOLL.—I move to strike out this argument.

A. (Continuing.) This deed shows that Mr. Eltinge, or somebody in Mr. Patrick Clark's office, received my letter with this deed in it at the time they supplied Mrs. Charlotte Clark's first name, as requested. They also added into the body of this deed this phrase: "This deed is executed and delivered in lieu of a former deed between the same parties, and for the same interest in said claims, which said deed has been lost or destroyed."

Mr. STOLL.—We move to strike that all out.

Q. Who wrote the body of that deed, Mr. Culbertson?

A. I did, and so stated in my letter to Mr. Clark on August 25th.

Mr. STOLL.—We move to strike that out. The letter is the best evidence.

Mr. CULBERTSON.—Is that the deed referred to in Mr. Eltinge's letter to you already in evidence?

A. That is the deed. That is the deed that I received in Mr. Eltinge's letter dated September 7th, and which was placed on record by me on September 9th, at Wallace, Idaho.

(Testimony of F. R. Culbertson.)

Q. That is the deed, is it? A. Yes, sir.

Mr. HEYBURN.—We offer the deed in evidence with its indorsements and everything on it.

Mr. STOLL.—We object to it as improper surrebuttal and improper for any purpose at any stage of the proceedings.

(Said deed is marked Defendants' Exhibit No. 19, and said original deed is hereto attached as such exhibit, and not copied into defendants' evidence, because a copy of it is already set out in the complainants' testimony.)

Mr. HEYBURN.—You offered certified copies, gentlemen, of the three deeds, one from James P. Harvey, one from Patrick Clark and wife, and one from Benjamin C. Kingsbury, to F. R. Culbertson, each for an undivided one-twentieth interest in the Ella and Missing Link claims. We now offer the original deeds in evidence, with the indorsements of record and all indorsements thereon.

Mr. WOODS.—We object to them as not proper surrebuttal, and as tending to encumber the record.

(Said original deeds last offered are hereto attached as Defendants' Exhibits Nos. 20, 21 and 22, and are not copied into defendants' evidence, because a copy of each of said exhibits is already set out in the complainants' testimony.)

Q. Now, Mr. Culbertson, you heard Patrick Clark yesterday state that you were mistaken in stating that you had a conversation with him in Spokane, in regard

(Testimony of F. R. Culbertson.)

to the sale of the Tiger-Poorman, as to the time. Will you state what you have to say from your recollection in regard to that matter?

Mr. STOLL.—That question is objected to as improper rebuttal.

A. I can state positively that the conversation occurred as I stated. That as to the time, whether it occurred in June or July of that year, I am not certain. It may have been July instead of June; it is two years back, and it is a pretty hard matter to fix the exact date; but as to the conversation taking place, I am absolutely positive that the conversation took place.

Q. As you have stated it?

A. As I have stated it.

Mr. STOLL.—We object to that and move to strike it out as being a mere reiteration of former testimony.

(Witness excused.)

Mr. STOLL.—I now move to strike out all the evidence on so-called surrebuttal as improperly admitted and for the reasons stated during the progress of the examination.

Mr. HEYBURN.—Do you consent, gentlemen, to the Court appointing the engineer and assayer referred to in the notice I served on you this morning?

Mr. STOLL.—Oh, no.

Defendants rest.

Complainants rest.

Certificate of Examiner.

State of Idaho, }
County of Latah. } ss.

I, Warren Truitt, examiner for the United States Circuit Court, for the District of Idaho, Northern Division, do hereby certify that the foregoing testimony of the respective witnesses therein named, on behalf of the complainants, and the defendants, was taken before me, at the City of Spokane, State of Washington, at the dates named in connection with their testimony, by stipulation of the parties in said action; that before these witnesses testified they were each duly sworn by me to tell the truth, the whole truth, and nothing but the truth, and that then the foregoing testimony of each witness as therein named was taken and written down in my presence by E. J. Lake and C. H. Sholes, the stenographers agreed upon by the said parties to report the same; that during the taking of said testimony the complainants appeared by their attorneys, Messrs. Stoll & MacDonald, M. J. Gordon, and W. W. Woods, and the defendants appeared by Messrs. Heyburn & Heyburn, their attorneys. And it was stipulated before me by said attorneys, for the respective parties, as above named, that the testimony of all witnesses therein named, as noted and written out by the said stenographers should be taken and accepted as the testimony of said witnesses, and reported to the Court by me as such without being signed by the witnesses, subject to such objections as appear thereto.

And I further certify that the several exhibits which accompany said testimony were offered in evidence by the respective parties, as noted therein.

Dated this 3d day of February, 1902.

WARREN TRUITT,
Examiner.

At a stated term of the Circuit Court of the United States, for the District of Idaho, held at Boise, Idaho, on the 8th day of February, A. D. 1902.
Present: Honorable JAMES H. BEATTY, Judge.

PATRICK CLARK et al.

vs.

BUFFALO HUMP MINING COM-
PANY et al.

No. 247.
Northern Division

Order of Circuit Court Setting Cause for Hearing at Boise.

On this day, this cause came on to be heard upon the defendant's motion for the appointment of an engineer and assayer to examine and determine the existence and character of ore bodies on the 800 foot level and 1,200 foot level of the Ella and Missing Link lode claims. W. B. Heyburn, Esq., appearing as counsel for defendant and the motion, and W. T. Stoll and W. W. Woods, Esqs., for the plaintiffs and against said motion, and after argument and upon consideration, the Court ordered that said motion be denied. Thereupon, by consent of counsel for the respective parties, in open court, it is ordered that plaintiffs have twenty days from this date to prepare and serve their brief herein upon the law and facts

upon defendants; that defendants have twenty days after the expiration of the aforesaid twenty days to prepare and serve its brief upon plaintiffs and that said cause be set for trial before this Court at Boise, Idaho, on March 31, 1902, at 10 o'clock A. M.

UNITED STATES OF AMERICA.

District of Idaho—ss.

I, A. L. Richardson, clerk of the United States Circuit Court for the District of Idaho, do hereby certify that the foregoing copy of journal entry in cause No. 247, Patrick Clark et al. vs. Buffalo Hump Mining Co. et al., has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original as the same appears of record at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, in said District, this 26th day of July, 1902.

[Seal]

A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 870. United States Circuit Court of Appeals for the Ninth Circuit. Patrick Clark et al. vs. Buffalo Hump Mining Co. et al. Certified Copy Order of Circuit Court Setting Cause for Hearing at Boise. Filed July 30, 1902. Frank D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

*In the Circuit Court of the United States for the District of
Idaho, Northern Division.*

PATRICK CLARK, BENJAMIN C.
KINGSBURY, JAMES P. HARVEY
and A. G. KERNS, Administrator of
the Estate of James Clark, Deceased,
Complainants,

vs.

No. 247.

BUFFALO HUMP MINING COM
PANY (a Corporation), EMPIRE
STATE-IDAHO MINING & DEVEL
OPING COMPANY (a Corporation),
Defendants.

Notice of Petition for Appeal.

To the Defendants Above Named, and W. B. Heyburn
and E. M. Heyburn:

Take notice, that complainants have waived the thirty days allowed them by the Court to take further steps before a decree was entered herein, now giving you notice that on Thursday, July 3d, at 10 o'clock A. M., at the opening of court at Boise, Idaho, complainants will submit to the Court for signature and entry, a draft of a decree, of which the annexed Exhibit "A" is a true copy, same being in conformity with the opinion of the Court filed herein, or such other decree as the Court may deem appropriate in the premises, and will also, at the same time and place, present to the Court for allowance, their petition for appeal, and ask the Court to enter an

order allowing an appeal to the Circuit Court of Appeals for the Ninth Judicial Circuit, and fixing the amount of complainants' bond on appeal, to operate as a supersedeas and cost bond, a copy of which petition, to which is attached complainants' assignment of errors, and a copy of the proposed order allowing such appeal, is hereby attached and made a part hereof.

Dated June 27th, 1902.

STOLL & MacDONALD,
M. J. GORDON,
W. W. WOODS,
Solicitors for Complainants.

[Endorsed]: No. 247. United States Circuit Court, Northern Division, District of Idaho. Patrick Clark et al. vs. Buffalo Hump Mining Company et al. Notice. Filed July 2d, 1902. A. L. Richardson, Clerk.

*In the Circuit Court of the United States, for the District of
Idaho, Northern Division.*

PATRICK CLARK, BENJAMIN C.
KINGSBURY, JAMES P. HARVEY
and A. G. KERNS, Administrator of
the Estate of James Clark, Deceased,
Complainants,

vs.

No. 247.

BUFFALO HUMP MINING COM-
PANY (a Corporation), and EMPIRE
STATE-IDAHO MINING & DEVEL-
OPING COMPANY (a Corporation),
Defendants.

Assignment of Errors.

I.

The Circuit Court erred in its decree, directing the dismissal of complainants' bill; because—

1st. The evidence showed that the defendant, the Buffalo Hump Mining Company, procured the complainants to transfer to it, the property in controversy, by false and fraudulent representations made to the complainants, by the officers of the defendant company, because,

2d. The evidence showed that the defendants secretly and clandestinely explored the premises in controversy, through the workings owned by and under the exclusive control of the defendants, without the knowledge or permission of the complainants, and that in do-

ing so, they committed trespasses, and at the time of making the purchase of the premises in controversy, suppressed from the complainants the ore discoveries within the premises in controversy, for the purpose of cheating and defrauding the complainants, the complainants not having equal means of knowledge thereof; because,

3d. The evidence showed that the consideration paid to the complainants for the purchase of the premises in controversy was so grossly inadequate as to make the sale fraudulent; because,

4th. The evidence showed that if the defendants had not fraudulently concealed and suppressed from the complainants the condition of the premises in controversy at the time of the sale, a matter which was exclusively within the knowledge of the defendants, complainants would not have assented to the sale.

II.

The Court erred, because said decree is contrary to the evidence.

III.

The Court erred, because said decree is contrary to law.

IV.

The Court erred, because the decree should have been in favor of the complainants, according to the prayer of the bill of complaint.

V.

The Court erred, in holding that complainants made

no sufficient effort, prior to the sale, to ascertain the value of the premises.

VI.

The Court erred, in holding that complainants have not proven the fraud they charge, by that clear and decided evidence which the law demands.

VII.

The Court erred, in holding that complainants in delaying for over eighteen months to commence their action, have not shown the best of faith, and that it was unreasonable, that they should have been so long in making their discoveries; because,

1st. The evidence showed that complainants filed their bill of complaint within a reasonable time, after becoming informed of the fraud perpetrated upon them, complained of in said bill. No intervening right having accrued.

VIII.

The Court erred, in holding that a higher degree of caution is required, and more investigation demanded by a party selling a mineral claim, than in selling any other character of property, before a charge of fraud can be established with reference to the same.

IX.

The decree should have been for the complainants, because the Court has found:

1st. That the property in question was, at the time of sale, of greater value than complainants received.

2d. That the price received would not have been ac-

cepted, had they known, at the date of the sale, the conditions then existing in the drill holes and crosscut, upon the property in controversy.

3d. That Sweeny knew of the ore discoveries in the drill holes, and must have known something of the conditions in the crosscut.

4th. That Sweeny did not communicate such knowledge to the complainants, or either of them.

STOLL & MacDONALD.

M. J. GORDON, and

W. W. WOODS,

Solicitors for Complainants.

[Endorsed]: No. 247. In the Circuit Court of the United States, District of Idaho, Northern Division. Clark et al., Plaintiffs, vs. Buffalo Hump Mining Company, Defendant. Assignment of Errors. Filed July 2d, 1902. A. L. Richardson, Clerk.

*In the Circuit Court of the United States for the District of
Idaho, Northern Division.*

PATRICK CLARK, BENJAMIN C.
KINGSBURY, JAMES P. HARVEY,
and A. G. KERNS, Administrator of
the Estate of James Clark, Deceased,
Complainants,

vs.

BUFFALO HUMP MINING COM-
PANY (a Corporation), and EMPIRE
STATE-IDAHO MINING & DEVEL-
OPING COMPANY (a Corporation),
Defendants.

Petition for Appeal.

The above-named complainants, conceiving themselves aggrieved by the decree made and entered in the above entitled cause on the 3d day of July, 1902, wherein and whereby it was ordered, adjudged and decreed, among other things, "that the prayer of the complainants be denied, that their bill of complaint be dismissed, and that they take nothing by this suit. That the defendants be hence dismissed with their reasonable costs. Defendants' costs taxed at \$———. The said costs amounting to \$———," do hereby appeal from the said decree, and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, filed herein, and they pray that this appeal may be allowed, and

that a transcript of the record, testimony, exhibits, stipulations, depositions, and all proceedings herein, upon which the said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that a bond on appeal may be fixed by the Court, the same to act as a supersedeas bond, and also as a bond for costs and damages on appeal.

STOLL & MacDONALD,
M. J. GORDON,
W. W. WOODS,
Solicitors for Complainants.

Order Allowing Appeal.

Order: That an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree heretofore filed and entered herein, be and the same hereby is allowed; and that a certified transcript of the record, testimony, exhibits, stipulations, depositions, and all proceedings herein be forthwith transmitted to the said Circuit Court of Appeals. It is further ordered that the bond on appeal be fixed at the sum of \$5,000, the same to act as a supersedeas bond, and also as a bond for costs and damages on appeal. The same to be approved by the clerk of this Court.

Dated at Boise, Idaho, this 3d day of July, 1902.

JAS. H. BEATTY,

Judge.

[Endorsed]: No. 247. In the Circuit Court of the United States, District of Idaho, Northern Division. Patrick Clark et al., Plaintiffs, vs. Buffalo Hump Mining Company et al., Defendants. Petition. Filed July 3d, 1902. A. L. Richardson, Clerk. Stoll & Macdonald, The Rookery, Spokane, Washington, Attorneys for Complainants.

In the Circuit Court of the United States for the District of Idaho, Northern Division.

PATRICK CLARK, BENJAMIN C. KINGSBURY, JAMES P. HARVEY, and A. G. KERNS, Administrator of the Estate of James Clark, Deceased, Complainants,

vs.

BUFFALO HUMP MINING COMPANY (a Corporation), and EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY (a Corporation), Defendants.

Bond on Appeal.

Know all men by these presents: That we, Patrick Clark, Benjamin C. Kingsbury and James P. Harvey, of the city and county of Spokane, State of Washington, and A. G. Kerns, as administrator of the estate of James Clark, deceased, of Wallace, Idaho, as principals, and National Surety Company, a corporation created by the laws of the State of New York, with its principal place

of business at 346 Broadway, in the city of New York, as surety, and each of us, are held and firmly bound by these presents, unto the defendants above named, their successors and assigns, in the just and full sum of \$5,000, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 5th day of July, A. D. 1902.

Whereas, on the 3d day of July, 1902, a decree and judgment was entered in the above-entitled suit in the court aforesaid, in favor of the defendants, and the said complainants, Patrick Clark, Benjamin C. Kingsbury, James P. Harvey, and A. G. Kerns, administrator of the estate of James Clark, deceased, are prosecuting an appeal therefrom to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit,

Now, therefore, the condition of this obligation is such, that if the above-named Patrick Clark, Benjamin C. Kingsbury, James P. Harvey and A. G. Kerns, administrator of the estate of James Clark, deceased, appellants, shall prosecute their appeal to effect, and if they fail to make their plea good, shall answer all damages and costs in this suit, then this obligation shall be void; otherwise to be and remain in full force and effect.

PATRICK CLARK.

BENJAMIN C. KINGSBURY.

JAMES P. HARVEY.

A. G. KERNS,

Administrator of the Estate of James Clark, Deceased.

NATIONAL SURETY COMPANY,

By CHAS. S. ELTINGE,

[Seal]

Resident Vice-President.

Attest: E. C. MacDONALD,

Resident Assistant Secretary.

The foregoing bond is hereby approved, this 5th day of July, 1902.

JAS. H. BEATTY,

Judge.

AFFIDAVIT, ACKNOWLEDGMENT AND JUSTIFICATION BY GUARANTEE OR SURETY COMPANY.

State of Washington, }
County of Spokane. } ss.

On this 5th day of July, one thousand nine hundred and two, before me personally came E. C. MacDonald, known to me to be the resident assistant secretary of the National Surety Company, the corporation described in and which executed the within and foregoing bond of Patrick Clark et al., as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the city of Spokane, State of Washington; that he is the resident assistant secretary of said company, and knows the corporate seal thereof; that the said national surety company is duly and legally incorporated, under the laws of the State of New York; that said company has complied with the provisions of the act of Congress of August 13th, 1894; that the seal affixed to the within

bond of Patrick Clark et al. is the corporate seal of said company, and was thereto affixed by order and authority of the Board of Directors of said company, and that he signed his name thereto by like order and authority as resident assistant secretary of said company, and that he is acquainted with Chas. S. Eltinge, and knows him to be the resident vice-president of said company; and that the signature of said Chas. S. Eltinge, subscribed to said bond is the genuine handwriting of said Chas. S. Eltinge, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution, exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of five hundred thousand dollars.

F. L. Moore is our agent to acknowledge service in the Judicial District, wherein this bond is given, and resides at Moscow.

E. C. MacDONALD.

(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence, this 5th day of July, 1902.

[Seal]

W. S. GILBERT,

(Officer's Signature, Description and Seal.)

Notary Public, in and for the State of Washington, Residing at Spokane.

[Endorsed]: No. 247. In the Circuit Court of the United States, District of Idaho, Northern Division. Patrick Clark et al., Plaintiffs, vs. Buffalo Hump Mining

Co. et al., Defendants. Bond on Appeal. Filed July 5th, 1902. A. L. Richardson, Clerk.

In the United States Circuit Court for the District of Idaho, Northern Division.

PATRICK CLARK, BENJAMIN C. KINGSBURY, JAMES P. HARVEY, and A. G. KERNS, Administrator of the Estate of James Clark, Deceased,
Complainants,

vs.

BUFFALO HUMP MINING COMPANY (a Corporation), and EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY (a Corporation),

Defendants.

Order to Transmit Original Exhibits to United States Circuit Court of Appeals.

It is hereby ordered that all original exhibits offered in evidence by either plaintiff or defendant on the trial of the above-entitled cause, be allowed to be withdrawn from the files for the purpose of being transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as a part of the record on appeal to the said United States Circuit Court of Appeals in this cause and that the same be returned to this court upon the final termination of said appeal in the said United States Circuit Court of Appeals.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 247. United States Circuit Court, Northern Division, District of Idaho. Patrick Clark et al. vs. Buffalo Hump Mining Company et al. Order to Transmit Original Exhibits to United States Circuit Court of Appeals. Filed July 7th, 1902. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Northern Division.

PATRICK CLARK, BENJAMIN C. KINGSBURY, JAMES P. HARVEY, and A. G. KERNS, Administrator of the Estate of James Clark, Deceased,
Appellants,
against

BUFFALO HUMP MINING COMPANY (a Corporation), and EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY (a Corporation),
Respondents.

Citation.

United States of America—ss.

The President of the United States, to the Buffalo Hump Mining Company, a Corporation, The Empire State-Idaho Mining & Developing Company, a Corporation, and to Your Attorneys, Greeting:

Whereas Patrick Clark, Benjamin C. Kingsbury, James P. Harvey, and A. G. Kerns, administrator of the

estate of James Clark, deceased, have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a decree rendered in the Circuit Court of the United States for the District of Idaho, on the third day of July, 1902, in your favor, and have given the security required by law, you are, therefore, hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, to be holden at San Francisco, State of California, on the 3d day of August, 1902, to show cause, if any there be, why the said decree should not be corrected and speedy justice done to the parties in that behalf.

Given under my hand at Boise, in said district, this 5th day of July, A. D. 1902.

J. H. BEATTY,
Judge.

Attest:

[Seal]

A. L. RICHARDSON,
Clerk.

RETURN.

And thereupon it is ordered by the Court, that a transcript of the record and proceedings in the case aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest:

[Seal]

A. L. RICHARDSON,
Clerk.

Service of the foregoing citation by copy admitted this 8th day of July, A. D. 1902.

W. B. HEYBURN,
Solicitor for Defendants.

[Endorsed]: No. 247. In the Circuit Court of the United States, District of Idaho, Northern Division. Patrick Clark et al., Appellants, vs. Buffalo Hump Mining Company et al., Respondents. Citation. Filed July 12, 1902. A. L. Richardson, Clerk.

*In the Circuit Court of the United States, in and for the
District of Idaho, Northern Division.*

PATRICK CLARK, BENJAMIN C.
KINGSBURY, JAMES P. HARVEY,
and A. G. KERNS, Administrator of
the Estate of James Clark, Deceased,
Appellants,

vs.

BUFFALO HUMP MINING COM-
PANY (a Corporation), and EMPIRE
STATE-IDAHO MINING & DEVEL-
OPING COMPANY (a Corporation),
Respondents.

Clerk's Certificate to Transcript.

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to —, inclusive, to be a full, true and correct copy of

the pleadings and proceedings in the above entitled cause (except the original exhibits and proceedings upon motion for injunction); and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$678, and that the same has been paid by appellants.

Witness my hand and the seal of said Circuit Court, affixed at Boise, Idaho, this 22d day of July, A. D. 1902.

[Seal]

A. L. RICHARDSON,

Clerk.

Journal Entry.

At a stated term of the Circuit Court of the United States for the District of Idaho, held at Boise, Idaho, Saturday, September the 14th, A. D. 1901. Present: Honorable JAMES H. BEATTY, Judge.

PATRICK CLARK et al.,

Complainants,

vs.

THE BUFFALO HUMP MINING COMPANY et al.,

Defendants.

No. 247.
Northern Division

Order Permitting Plaintiffs to Enter Premises.

The plaintiffs having withdrawn their application for an injunction and a receivership, by agreement of par-

ties expressed in open court, it is ordered—

That the plaintiffs and their engineers, with necessary assistants, be allowed to enter into the premises in controversy in this suit through the workings of the defendants to make an underground survey and examination of the premises in controversy in this suit, and that until this case has been finally tried and decided by this Court, the plaintiffs be allowed access to the premises in controversy through the workings of the defendant companies by a representative to be appointed by the plaintiffs, at all reasonable times; such representative to be either one of the plaintiffs or some person unobjectionable to the defendants.

UNITED STATES OF AMERICA.

District of Idaho—ss.

I, A. L. Richardson, Clerk of the United States Circuit Court for the District of Idaho, do hereby certify that the foregoing copy of journal entry in cause No. 247, Patrick Clark et al., vs. Buffalo Hump Mining Company et al., has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court in said District, this 30th day of July, 1902.

[Seal]

A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 870. United States Circuit Court of Appeals, Ninth Circuit. No. 247. In the Circuit Court

of the United States, District of Idaho. Patrick Clark et al., vs. Buffalo Hump Mining Company et al. Certified Copy. Order Permitting Plaintiffs to Enter Premises. Filed August 5, 1892. F. D. Monckton, Clerk, United States Circuit Court of Appeals, for the Ninth Circuit.

[Endorsed]: No. 870. In the United States Circuit Court of Appeals for the Ninth Circuit. Patrick Clark, Benjamin C. Kingsbury, James P. Harvey, and A. G. Kerns, Administrator of the Estate of James Clark, Deceased, vs. The Buffalo Hump Mining Company (a Corporation), and the Empire State-Idaho Mining and Developing Company (a Corporation), Appellees. Transcript of Record Upon Appeal from the United States Circuit Court for the District of Idaho, Northern Division.

Filed July 28, 1902.

F. D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.



No. 870

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

PATRICK CLARK, BENJAMIN C. KINGS-
BURY, JAMES P. HARVEY and A. G.
KERNS, Administrator of the Estate of
JAMES CLARK, Deceased,

Appellants,

vs.

THE BUFFALO HUMP MINING COM-
PANY (a Corporation), and THE EMPIRE
STATE-IDAHO MINING & DEVELOP-
ING COMPANY, (a Corporation),

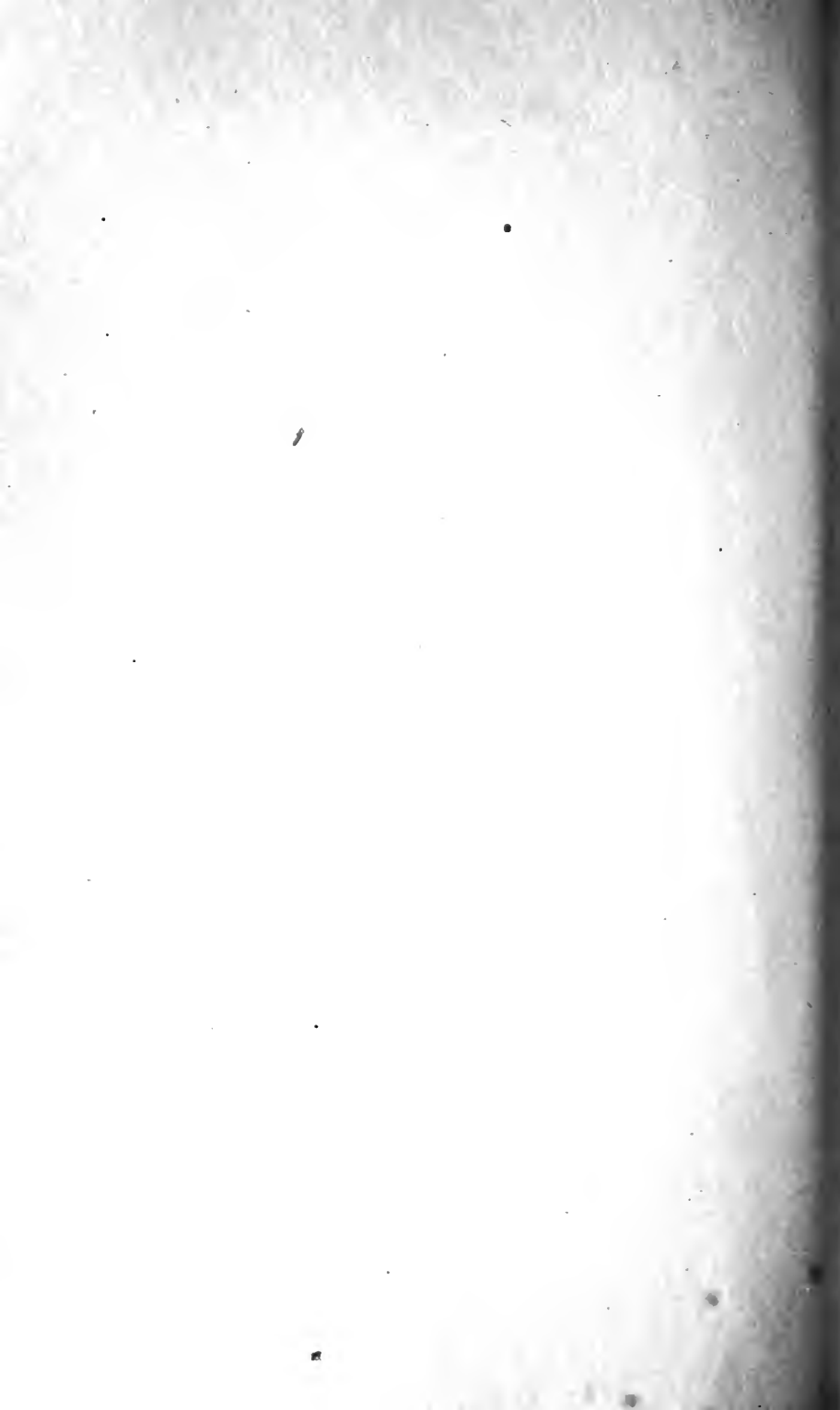
Appellees.

VOL. IV.

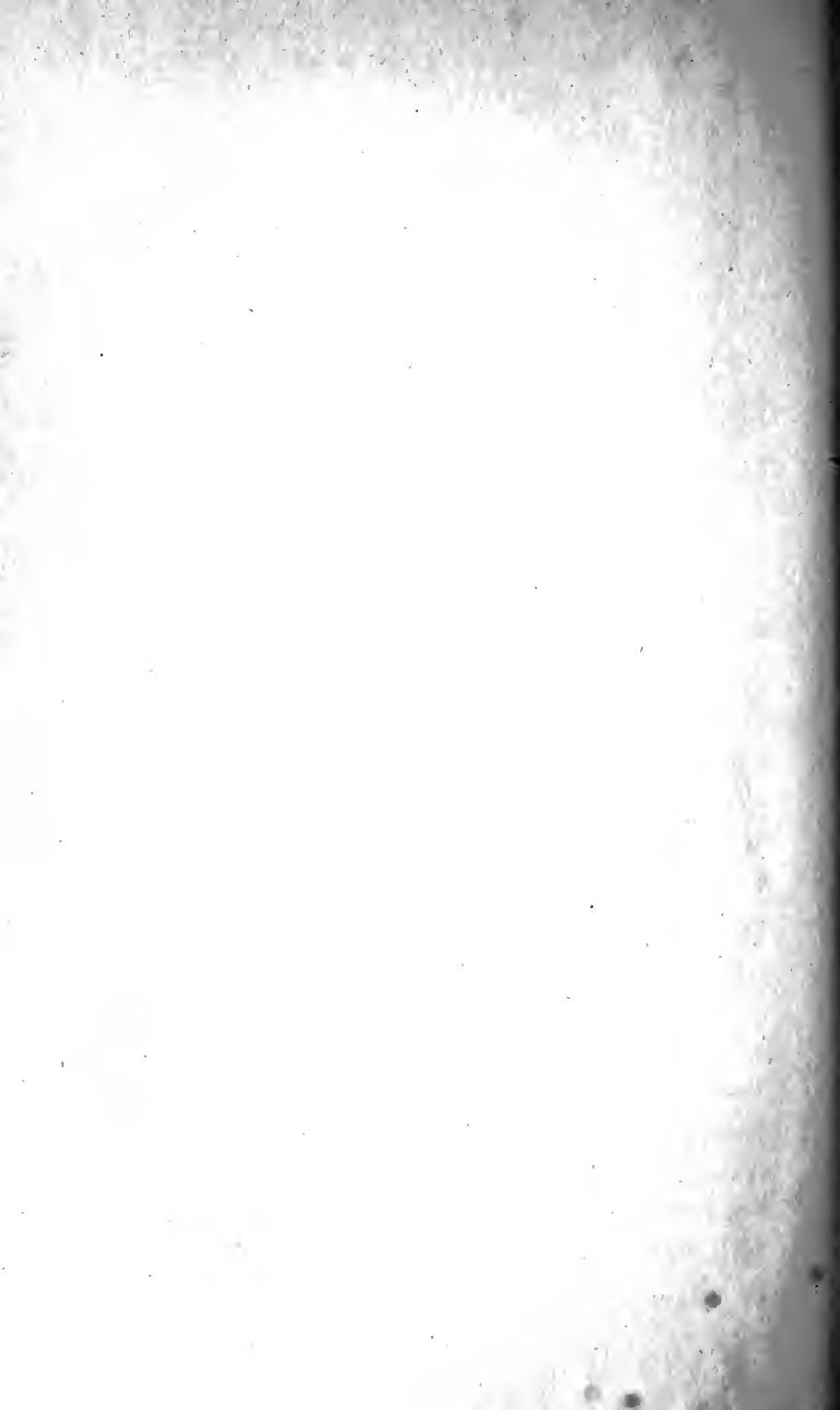
(Pages 1118 to 1301, inclusive)

EXHIBITS.

Upon Appeal from the United States Circuit Court
for the District of Idaho, Northern Division.



EXHIBITS.



Plaintiffs' Exhibit No. 1.

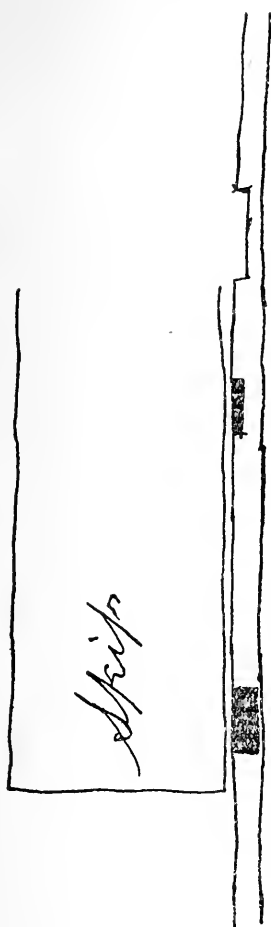
[Pocket Memorandum Book.]

[Endorsed]: Clark vs. Sweney. Plffs' Ex. 1 (entry).
E. J. L. Sten. In Evidence.

Caps		3
8-2-12 in	Outside	
66		
9-3 12 "		4
6	1300 Station	
8-9 10	O. Edlund	
6	Ransom	
	quit	
1	3 o'clock shift	
Rodes	Palmer	
No Card	Goettlisher	
Foster	A Nelson	
Walker	Jas. D. Moor	
Louis Kuchen		
McMaster		5
Funchanis sick	Did Not Work	20
2		6
Dayley	No 1 Tunnell	
H. Rogell	C M Armstrong	
Antone Swanson	Frank Gay	
Thos. McGowan	Chas Tubert	
R. S. Kelley	H. W Hite	
G. Brown	John McBride	

Bassett		Drill Hole in
A.		Tunnell 100 feet
		on Left crosscut
	7	
		11
	8	150 feet.
Palmer		Side 150 feet
Filet Goettlicker		Sept 7-99
Chas Osgood Miner		face of tunnel
H. O. Dahll		On Left side
Hahn H		Drill Hole
Jacob		150 feet
Jacob		Sept 10 99
Hahn		Tunell
		Hole to Right
	9	of Drift 100 feet
H		
		12
	10	Sept 15
	Aug 22-99	100 foot
Drill Hole on 1200		Level on
Hanging Side		Poorman
Aug 26		Side
Hole on foot		Hole
Sept 1		182 feet
1100 Drift		Sept 19 99
East		Drill Hole
Hole 67 feet		146 feet
Sept 4-99.		

14



40 P. 8x14x10 feet
 1600 Peces
 2x12x4 feet 9½ inches
 100 Peces
 2x4x20
 400 Peces
 5½x20 feet
 100 Peces 1x4x16
 Sept 9|99
 Nom of Sahe
 No 37611
 Oreded
 Nails
 1 keg 60
 1 " 40
 1 " 20
 1 " 10
 200 feet
 ½ Rope

20

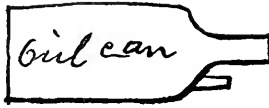
John Stone
 Al. Engeberg
 December 31

16

Shaft Lumber
 80 P. 10x10x16 feet
 40 " 10x10x18 "
 40 " 10x10x14 "
 40 " 8x10x18 "

Drill Hole
 in fly
 Wheel Prit
 62 feet 6 in

22



at Poorman
from foot
Wall to face
34 feet

24

from center
of Scuckison
Chamber
To center of
Fly Wheel
is 26 feet

8 off Face
26 feet
11 Each

29

1|99

32

26

pffs 6 for ident

1100 crosscut
17 feet 8 in

E. J. L. on the

6 of Decem

W J Bailey

Jan 15|1900

1200 Drifte

34

144 feet

Peter

1200 West

Gilorich

25 feet

1300 Drifte

44

100 feet

Sept supplies

1600 D. E 70

15 Box Candles

1600 D W 80

6. 12 Lbs. Hamers

1 Crosscut Hand

28

Saw

December

Norwick

Crosscut on

E. Pierce

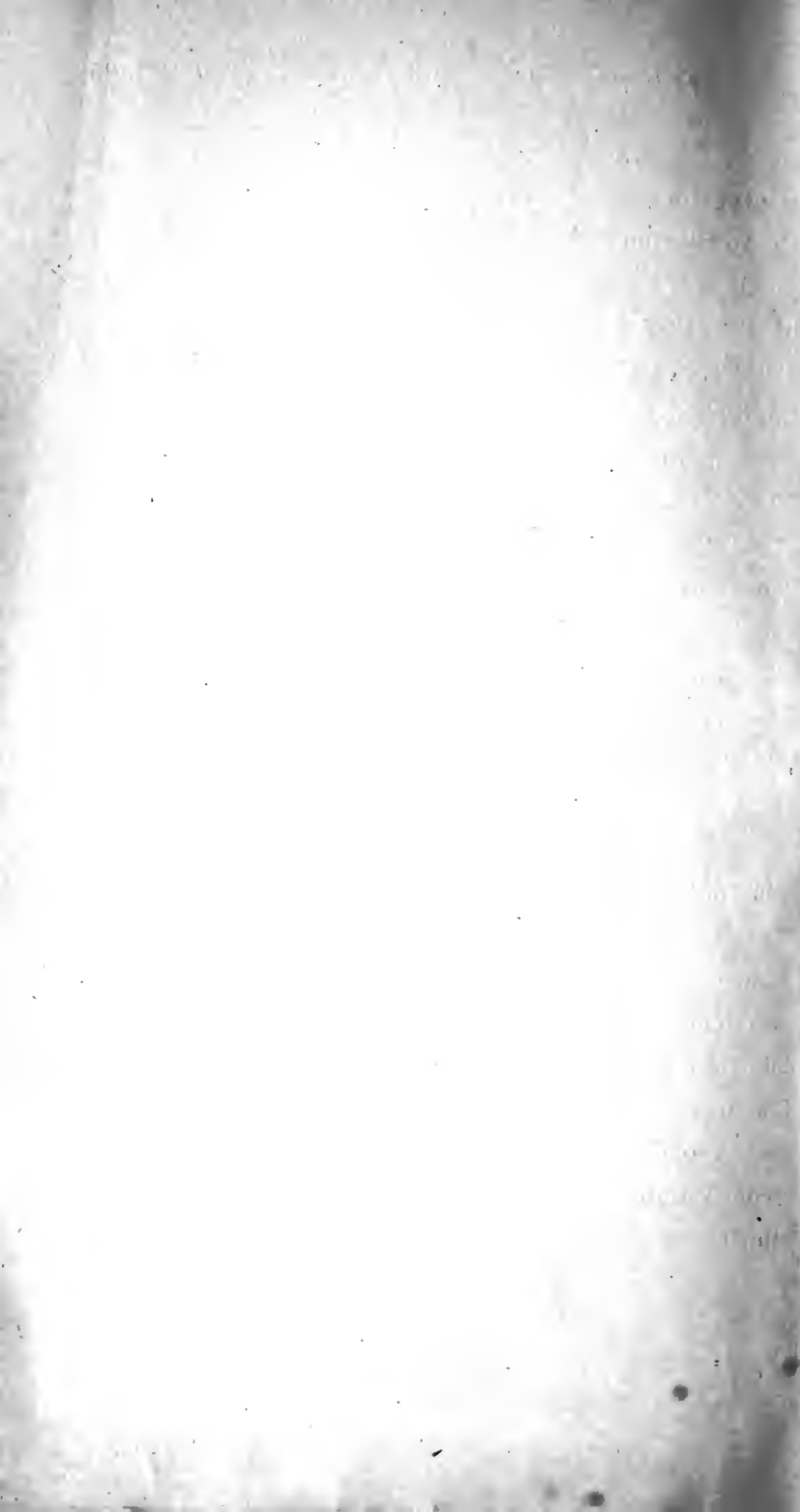
100 foot Livel

Thos Kempsey

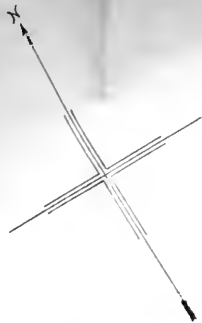
45	52
Sept 10 99	Plffs 3 Ident. E. J. L.
	Dec 1 99
47	1200 East
Sin	Drift 75 feet from x cut
48	Dec 4 99
Al Presby	Drill Hole in No 1 tunnell 1350 feet 9 in
50	
Oct 1 99	53
1600 crosscut	Pff's Ident. Ex. E. J. L.
47 feet from	Dec 15 99
Shaft	1200 East Drift
1200 crosscut	102 ft 4 ft of
34 ft total	ore
Distans from	1300 East Drift
foot Wall 41 ft.	from crosscut
Week Ending Oct. 8-99	42 ft 18 in
Plffs Ex. 1	ore 1600
1200 crosscut 47 feet to Ore	East Drift
1600 crosscut from Shaft	from x cut
60 feet adavance 13 ft	25 ft 6 inch
1600 Pump Station 40 feet	ore
from Shaft 20 ft wide	
Thos Jay	54
	Dec 15 99
51	1600 West
	Drift from

x cut 28 ft	Drift 65 feet
2 feet of ore	2 feet of ore
1500 east	
Drift from	58
x cut 275 ft	Week Ending Jan 6 1900
3 ft of ore	1200 .ED. 133 ft 2 ft of ore
	1200 .W .D 16 feet 2 ft of ore
	ore
56	1300 East Drift 84 ft 1 foot of ore
Jan 1 1900	1500 East Drift 314 ft 5 ft of ore
1200 Drift	1600 East Drift 78 ft 1 foot of ore
East of x cut	1600 West Drift 82 ft 6 inch of ore
123 ft 3 ft of ore	
1200 West of x cut 11 ft 2 ft of ore	
1300 East Drift 75 ft 2 ft of ore	59
	72
57	\$2000
Jan 1 1900	\$2000
1500 Drift East 305 feet	76
4 ft of ore	Culbertson
1600 West Drift 60 feet 18 in of ore	at the Old National Bank
1600 East	Spokane

78	82
Laging for	No.
Pump Station	East E. St.
to the set	Iron Mountain
64 P 2x12x5 feet	Michigan
720 Peces	\$83-25c
Laging for	Board for Table
Water Station	$\frac{3}{4}$ x3 feet 3 in
50 Peces 2x12x5	Slat $2\frac{1}{2}$ in
250 2x12x5 fet	and one and
Totel for	$1\frac{3}{4}$ in
Pum Station	
and Moter	84
Station	1100 Drift East
970 P 2x12x5	650 feet to care
	Total 825 feet
	to face
80	Aug 26 99
100 foot Level	the Last Lift
East of ore	From 1500 is 112
Shute	feet to Bottom
236 feet	of Station
200 foot Level	which is Call
330 feet	1600 Station
Work	
from Pump	
Shaft	



- Plan of the -
1200 FT. LEVEL
POORMAN - ELLA MINE
 SCALE 60 FT = 1 INCH



*P. H. H. 2
 Jan 21 1901
 P. H. H.*

POORMAN

ELLA

ONNELL

WHEELER

MAIN

CROSS CUT

ABANDONED DRIFT

INTERMEDIATE DRIFT

MISSING LINK

S 81° 33' E 787.8

S 53° 36' E

S 22° E 579.4

S 58° 22' W 579.4

N 24° 25' E 481.4

N 71° 00' W 193.6

S 38° 42' E

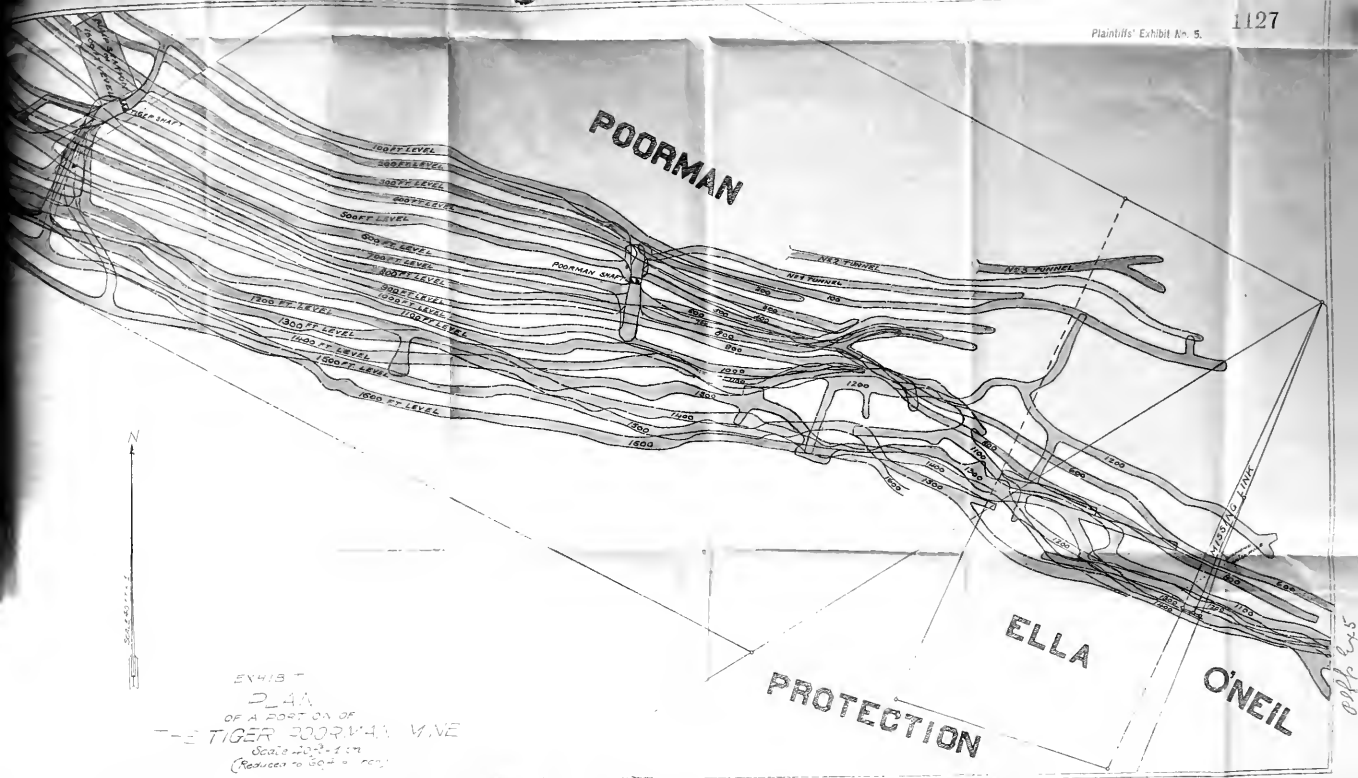


EXHIBIT
 24A
 OF A PART OF
 THE TIGER POORMAN MINE
 Scale 200' = 1" (Reduced to 500' = 1")

copy 2x5

191 e

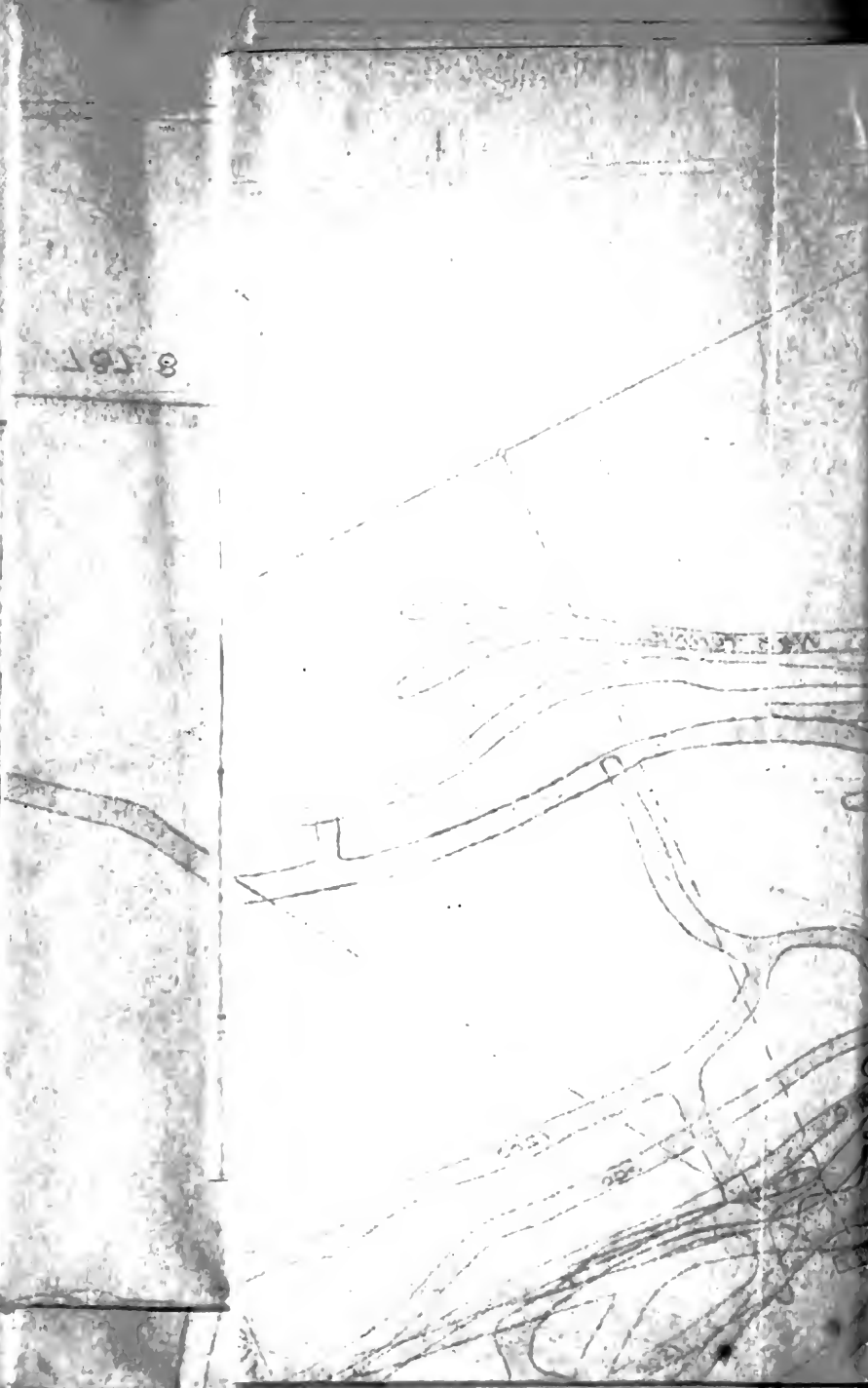
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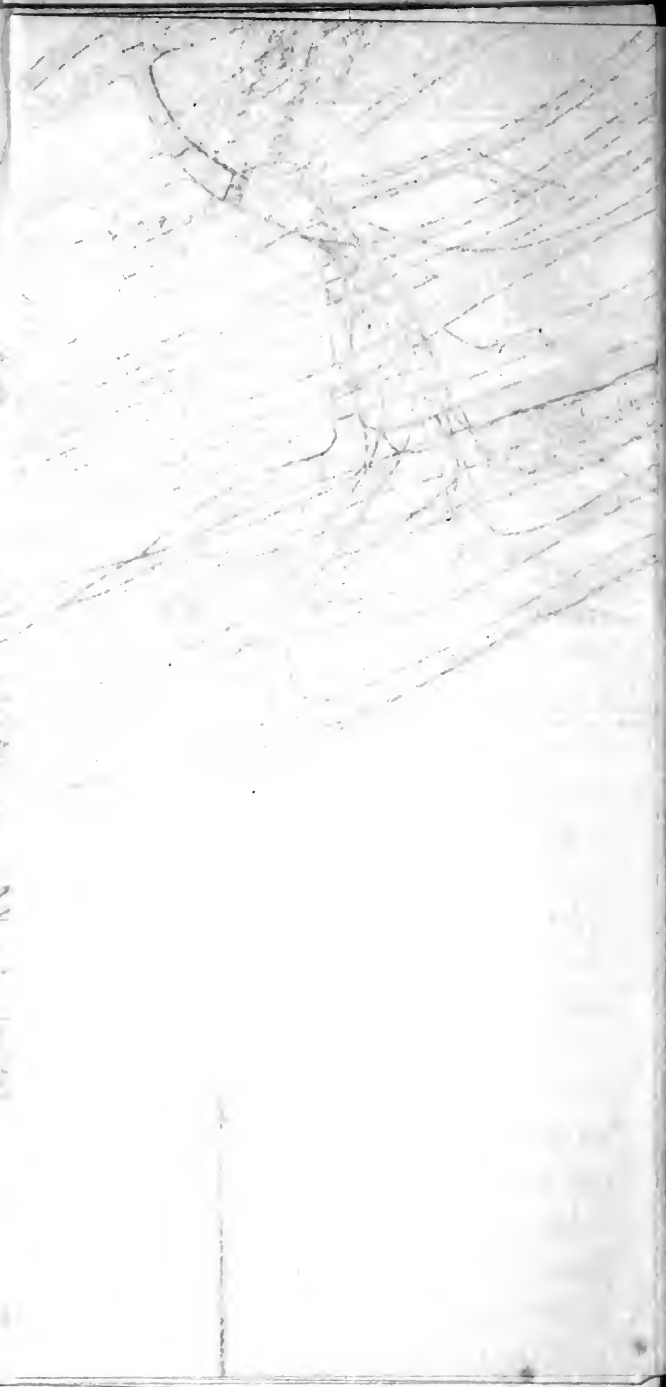
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1918



Plaintiffs' Exhibit No. 7.

Mining Deed.

This Indenture, made this 6th day of February, A. D. 1896, between Patrick Clark and his wife Mary R. Clark, of the County of Spokane and State of Washington, parties of the first part, and F. R. Culbertson, of the county of Shoshone and State of Idaho, party of the second part;

Witnesseth: That the said parties of the first part, for and in consideration of the sum of One Dollar, Gold Coin of the United States, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, his heirs and assigns, the undivided one-twentieth (1-20) interest in the Ella Fraction and the undivided one twentieth (1-20) interest in the Missing Link claim, as located, surveyed, recorded and held by said parties of the first part, situated at Burke, in the Lalande Mining District, Shoshone County, State of Idaho, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, in-

terest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to, the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

In Testimony Whereof, the said parties of the first part have hereunto set their hand and seal the day and year first above written.

PATRICK CLARK. [Seal]

MARY R. CLARK. [Seal]

Signed, sealed, and delivered in the presence of:

F. E. LUCAS.

State of Washington, }
County of Spokane. } ss.

I, W. M. Shaw, a notary public in and for said county and State, do hereby certify that on this seventh day of March, A. D. 1896, personally appeared before me, Patrick Clark and his wife, Mary R. Clark, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 7th day of March, A. D. 1896.

[Seal]

W. M. SHAW,
Notary Public, Residing at Spokane, Washington.

State of Idaho, }
County of Shoshone. } ss.

I hereby certify that the within instrument was filed for record in the office of the county recorder of said county, on the 26th day of August, A. D. 1899, at 9 o'clock A. M., at the request of F. R. Culbertson.

HORACE M. DAVENPORT,
County Recorder.

State of Idaho, }
County of Shoshone. } ss.

I, Horace M. Davenport, County Recorder in and for said county, do hereby certify that the foregoing copy of deed has been by me compared with the original and that it is a correct transcript therefrom as the same appears of record in book "14" of Deeds, on page 493 thereof, at my office and in my custody.

In testimony whereof, I hereunto set my hand and affix my official seal this 10th day of May, A. D. 1901.

[Seal] HORACE M. DAVENPORT,
County Recorder.

[Ten Cents U. S. Int. Rev. Stamp. Canceled.]

[Endorsed]: (Certified Copy). Deed. Patrick Clark and wife, to F. R. Culbertson. Plffs. Ex. 7. E. J. L.

Plaintiffs' Exhibit No. 8.
Mining Deed.

This Indenture, made this 11th day of February, A. D. 1896, between James Harvey, of Burke, of the County of

Shoshone and State of Idaho, party of the first part, and F. R. Culbertson, of the County of Shoshone and State of Idaho, party of the second part,

Witnesseth: That the said party of the first part, for and in consideration of the sum of One and 00-100 Dollars, Gold Coin of the United States, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever quitclaim, unto the said party of the second part, his heirs and assigns, the undivided one twentieth (1-20) interest in the Ella Fraction and Missing Link Fraction, as located, surveyed, recorded and held by said party of the first part, situated at Burke, in the Lalande Mining District, Shoshone County, State of Idaho, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises, thereto incident, appendant and appurtenant, or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said prem-

ises together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

In Testimony Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JAMES P. HARVEY. [Seal]

Signed, sealed, and delivered in the presence of:

State of Idaho, }
County of Shoshone. } ss.

I, H. M. Davenport, a notary public, in and for said county and State, do hereby certify that on this 24th day of February, A. D. 1896, personally appeared before me James P. Harvey, to me known to be the individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 24th day of February, A. D. 1896.

[Seal]

H. M. DAVENPORT,
Notary Public.

State of Idaho, }
County of Shoshone. } ss.

I hereby certify that the within instrument was filed for record in the office of the County Recorder of said

county, on the 26th day of August, A. D. 1899, at 9 o'clock A. M., at the request of F. R. Culbertson.

HORACE M. DAVENPORT,
County Recorder.

State of Idaho,
County of Shoshone. } ss.

I, Horace M. Davenport, County Recorder in and for said county, do hereby certify that the foregoing copy of Deed, has been by me compared with the original and that it is a correct transcript therefrom as the same appears of record in Book "14" of Deeds, on page 494 thereof, at my office and in my custody.

In Testimony whereof, I hereunto set my hand and affix my official seal this 10th day of May, A. D. 1901.

[Seal] HORACE M. DAVENPORT,
County Recorder.

[Ten Cents U. S. Int. Rev. Stamp. Canceled.]

[Endorsed]: (Certified Copy). Deed. James P. Harvey, to F. R. Culbertson. Plffs. Ex. S. E. J. L.

Plaintiffs' Exhibit No. 9.

Mining Deed.

This Indenture, made this 25th day of August, A. D. 1899, between Jas. Clark and Charlotte Clark, his wife, of the County of Spokane and State of Washington, parties of the first part, and F. R. Culbertson, of the County of Shoshone and State of Idaho, party of the second part,

Witnesseth: That the said parties of the first part,

for and in consideration of the sum of One (\$1.00) Dollars, Gold Coin of the United States, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released, and forever quitclaimed, and, by these presents, does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, his heirs and assigns, the undivided one-twentieth (1-20) interest in the Ella Fraction and Missing Link Fraction lode quartz claims, as located, surveyed, recorded and held by said party of the first part, situated at Burke, Idaho.

This deed is executed and delivered in lieu of a former deed between the same parties and for the same interest in said claims which said deed has been lost or destroyed; Lalande Mining District, Shoshone County, State of Idaho, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, in or to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said prem-

ises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

In Testimony Whereof, the said parties of the first part have hereunto set their hand and seal the day and year first above written.

JAMES CLARK. [Seal]

CHARLOTTE CLARK. [Seal]

Signed, sealed and delivered in the presence of:

CHAS. S. ELTINGE.

[U. S. I. R. 50c. stamp attached.]

State of Washington, }
County of Spokane. } ss.

I, Chas. S. Eltinge, a Notary Public, in and for said county and State, do hereby certify that on this 7th day of September, A. D. 1899, personally appeared before me, James Clark and Charlotte Clark, his wife, to me known to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

Given under my hand and official seal, this 7th day of September, A. D. 1899.

[Seal]

CHAS. S. ELTINGE,

Notary Public in and for said County and State, Residing at Spokane, Washington.

[U. S. I. R. stamps, 10c. attached.]

State of Idaho, }
County of Shoshone. } ss.

I hereby certify that the within instrument was filed

for record in the office of the County Recorder of said county on the 9th day of September, A. D. 1899, at 2 o'clock P. M.; at the request of F. R. Culbertson.

HORACE M. DAVENPORT,
County Recorder.

State of Idaho, }
County of Shoshone. } ss.

I, Horace M. Davenport, County Recorder in and for said county, do hereby certify that the foregoing copy of Deed, has been by me compared with the original and that it is a correct transcript therefrom as the same appears of record in Book "15" of Deeds, on page 532 thereof, at my office and in my custody.

In Testimony whereof, I hereunto set my hand and affix my official seal this 10th day of May, A. D. 1901.

[Seal] HORACE M. DAVENPORT,
County Recorder.

[Ten Cents U. S. Int. Rev. Stamp. Canceled.]

[Endorsed]: (Certified Copy). Deed. James Clark, and wife, to F. R. Culbertson. Plffs. Ex. 9. E. J. L.

Plaintiffs' Exhibit No. 10.

Mining Deed.

This Indenture, made this 6th day of February, A. D. 1896, between B. C. Kingsbury, of the County of Spokane and State of Idaho, party of the first part, and F. R. Culbertson, of the County of Shoshone, and State of Idaho, party of the second part,

Witnesseth: That the said party of the first part, for and in consideration of the sum of One Dollars, Gold Coin of the United States, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever quitclaim, unto the said party of the second part, his heirs and assigns, the undivided one-twentieth (1-20) interest in the Ella Fraction and the undivided one-twentieth (1-20) interest in the Missing Link claim, as located, surveyed, recorded and held by said party of the first part, situated at Burke, in the Lalande Mining District, Shoshone County, State of Idaho, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises, together with the appurtenances and privileges

thereto incident, unto the said party of the second part, his heirs and assigns forever.

In Testimony Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

BENJAMIN C. KINGSBURY. [Seal]

Signed, sealed, and delivered in the presence of:

F. E. LUCAS.

State of Washington, }
County of Spokane. } ss.

I, W. M. Shaw, a Notary Public in and for said county and State, do hereby certify that on this seventh day of March, A. D. 1896, personally appeared before me Benjamin C. Kingsbury, to me known to be the individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal, this 7th day of March, A. D. 1896.

[Seal]

W. M. SHAW,

Notary Public, Residing at Spokane, Washington.

State of Idaho, }
County of Shoshone. } ss.

I hereby certify that the within instrument was filed for record in the office of the County Recorder of said

county on the 26th day of August, A. D. 1899, at 9 o'clock A. M., at the request of F. R. Culbertson.

HORACE M. DAVENPORT,
County Recorder.

State of Idaho, }
County of Shoshone. } ss.

I, Horace M. Davenport, County Recorder in and for said county, do hereby certify that the foregoing copy of Deed, has been by me compared with the original and that it is a correct transcript therefrom as the same appears of record in Book "14" of Deeds, on page 496 thereof, at my office and in my custody.

In testimony whereof, I hereunto set my hand and affix my official seal this 10th day of May, A. D. 1901.

[Seal] HORACE M. DAVENPORT,
County Recorder.

[Ten Cents U. S. Int. Rev. Stamp. Canceled.]

[Endorsed]: (Certified Copy). Deed. B. C. Kingsbury, to F. R. Culbertson. Plffs. Ex. 10. E. J. L.

Plaintiffs' Exhibit No. 11.

Mining Deed.

This Indenture, made the thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-nine, between Patrick Clark, B. C. Kingsbury, James Clark and James P. Harvey, the parties of the first part, and the Buffalo Hump Mining Company, a corporation organized and existing under and by virtue of the

laws of the state of New York, the party of the second part,

Witnesseth: That the said parties of the first part, for and in consideration of the sum of Four Thousand Dollars, Gold Coin of the United States of America, to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey, unto the said party of the second part, and to its successors and assigns forever, an undivided four-fifths (4-5) interest in and to those certain mining claims known as the "Ella" and "Missing Link," situate in the Lalande Mining District, Shoshone County, State of Idaho.

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereunto belonging, and the rents, issues and profits thereof; and also all the estate, right, title, interest, possession, claim and demand whatsoever, as well in law as in equity, and as well in possession as in expectancy, of the said parties of the first part, in and the above granted premises, and every part and parcel thereof.

To have and to hold all and singular the said above granted premises, with the appurtenances and privileges

thereto incident unto the said party of the second part, its successors and assigns forever.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

PATRICK CLARK. [Seal]

B. C. KINGSBURY. [Seal]

JAMES CLARK. [Seal]

JAS. P. HARVEY. [Seal]

Signed, sealed and delivered in the presence of

A. L. KEMPLAND.

CHAS. KLEIN.

[U. S. I. R. \$4.00 stamps attached.]

State of Washington, }
County of Spokane. } ss.

On this 20th day of October, A. D. 1899, before me, a Notary Public in and for said County and State, personally appeared Patrick Clark, B. C. Kingsbury, James Clark and James P. Harvey, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Testimony Whereof, I have hereunto set my hand and official seal, the day and year in this certificate above written.

[Seal]

CHAS. ELTINGE,
Notary Public in and for the State of Washington, Residing at Spokane, Washington.

Recorded at the request of F. Lewis Clark, October 21,
1899, at 2 o'clock P. M.

HORACE M. DAVENPORT,
County Recorder.

State of Idaho, }
County of Shoshone. } ss.

I, Horace M. Davenport, County Recorder in and for
said county, do hereby certify that the foregoing copy
of Deed, has been by me compared with the original and
that it is a correct transcript therefrom as the same ap-
pears of record in Book "15" of Deeds, on page 32 there-
of, at my office and in my custody.

In testimony whereof, I hereunto set my hand and
affix my official seal this 10th day of May, A. D. 1901.

[Seal]

HORACE M. DAVENPORT,
County Recorder.

[Ten Cents U. S. Int. Rev. Stamp. Canceled.]

[Endorsed]: (Certified Copy). Deed. Patrick Clark
et al., to Buffalo Hump Mining Company. Plffs. Ex. 11.
E. J. L.

Plaintiffs' Exhibit No. 12.

UNITED STATES OF AMERICA.

STATE OF WASHINGTON.

Office of the

SECRETARY OF STATE.

I, Will D. Jenkins, Secretary of State of the State of

Washington, do hereby certify that I have carefully compared the annexed copy of the

ARTICLES OF INCORPORATION
of the
CONSOLIDATED TIGER AND POORMAN MINING
COMPANY,

with the original articles of incorporation, as filed for record and recorded in this office on the 27th day of August, A. D. 1895, at page 237, book 11, Domestic Corporations, and find the same to be a true and perfect copy thereof.

In Testimony Whereof, I have hereunto set my hand and affix the Seal of the State of Washington.

Done at Olympia, this fifth day of January, 1900.

[Seal]

WILL D. JENKINS,
Secretary of State.

ARTICLES OF INCORPORATION
of
THE CONSOLIDATED TIGER AND POORMAN MINING
COMPANY.

Know all men by these presents: That we, the undersigned, all of whom are citizens of the United States, and a majority of whom are residents of the State of Washington, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of Washington, and to that end we do hereby certify as follows:

Article I.

The name of said Corporation shall be THE CONSOLIDATED TIGER & POORMAN MINING COMPANY.

Article II.

The objects for which said Corporation is formed are: To engage in the business of mining and milling and smelting ores and minerals of all kinds; to own, sell, buy, lease, operate, mine, and develop mines, mining claims, mills, mill sites, flumes, dykes, ditches, water rights, tramways, trailroads; and more particularly to buy, operate and mine the Tiger and Poorman mines, mills and all appurtenances thereunto, belonging or therewith connected; situate at the town of Burke, in the LeLande Mining District, Shoshone County, Idaho.

Article III.

That the amount of the capital stock of said Corporation shall be One Million (\$1,000,000) Dollars, divided into one million (1,000,000) shares of the par value of one dollar each.

Article IV.

That the term for which said Corporation is formed is Fifty (50) years from and after this date.

Article V.

That the number of trustees of said corporation shall be Five (5), and the names and residences of the Trustees who are appointed to manage the concerns of the Corporation for Six (6) months from this date, and until the election and qualification of their successors, are S. S. Glidden, Spokane, Washington; F. R. Culbertson, Burke, Idaho; Patrick Clark, Spokane, Washington; B. C. Kingsbury, Spokane, Washington; and E. D. Olmstead, Spokane, Washington.

Article VI.

That the principal place of business of this corporation shall be at the City of Spokane, State of Washington; and that this Corporation may have such other branch places of business in the States of Washington and Idaho, as the Board of Trustees may designate.

In witness whereof, we have hereunto set our hands and seals in triplicate, this 26th day of August, A. D. 1895.

S. S. Glidden. [Seal]

F. R. Culbertson. [Seal]

Patrick Clark. [Seal]

B. C. Kingsbury. [Seal]

E. D. Olmstead. [Seal]

State of Washington, }
County of Spokane. } ss.

Be it remembered, That on the 26th day of August, A. D. 1895, before me, the undersigned, a Notary Public in and for the said county and state, personally appeared S. S. Glidden, F. R. Culbertson, Patrick Clark, B. C. Kingsbury, and E. D. Olmstead, to me known to be the persons named and described in and who subscribed their names to the within and foregoing Articles of Incorporation, and acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and official seal the day and year in this certificate above written.

[Notarial Seal]

CHAS. R. BROWN,

Notary Public for the State of Washington, Residing at
Spokane.

[Endorsed]: Certified Copy of the Articles of Incorporation of the Consolidated Tiger and Poorman Mining Company. State of Washington. Department of State, Olympia. Will D. Jenkins, Secretary of State. Plffs. Ex. 12. C. H. S.

Plaintiffs' Exhibit No. 13.

Mining Deed.

This Indenture, made this 7th day of October, 1895, between Stephen S. Glidden, and Sue M. Glidden, his wife, residents of the City of Spokane, County of Spokane, State of Washington, parties of the first part, and the Consolidated Tiger & Poorman Mining Company, a corporation organized under the laws of the State of Washington, with its principal place of business at Spokane, party of the second part, Witnesseth: That the said parties of the first part, for and in consideration of Five Hundred Thousand (500,000) shares of the Capital stock of the said Consolidated Tiger & Poorman Mining Company, of the Par value of One Dollar (\$1.00) per share, receipt of which is hereby acknowledged, have, and by these presents do grant, bargain, sell and convey unto the said party of the second part, its successors and assigns, all of the following described real estate, premises, mining claim, and

property. All situated in the Lalande Mining District, Shoshone County, Idaho, and more particularly described as follows, to wit: the Tiger mine, a silver-lead mine located originally by John Carton and Armendas Seymour, and by them conveyed to the first party, S. S. Glidden, said mine being since then patented by the government of the United States to the first party, S. S. Glidden, by its letters patent dated the 20th day of December, 1894, said patent being of record in the Recorder's Office of said Shoshone County, at Murray, Idaho, said mine situate on the mountain sloping westerly from Canyon Creek, immediately west of and adjoining the Poorman lode, at the Town of Burke, said county and state; together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver-bearing quartz, rock, and earth therein, and all the rights, privileges and franchises thereto, incident, appendant, and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to, the said premises, and every part and parcel thereof, with the appurtenances; together with the mill or concentrator called the Tiger Concentrator, shops, sheds, ore houses, ore bins, machinery, appliances thereof, connected or thereunto belonging, situate in and about said mine and concentrator; also those certain water rights

and dams or water reservoirs on said Canyon Creek above the said town of Burke, owned by the first parties and by them used for conducting water to said Tiger mine either to create power for the running of said mill or concentrator, or other purposes, together with those water courses conducting the water from said reservoirs or dams to the place of intended use; also that certain electric light plant connected with said Tiger mine and mill used to furnish light and partial power therefor, with the attachments, machinery and appliances thereunto connected.

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors and assigns forever, and the above-bargained and granted lands and mines, premises and hereditaments, corporeal and incorporeal, in the quiet and peaceful possession of the said party of the second part, its successors and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said first parties will warrant and defend.

And do also grant, bargain, sell, convey, and forever quitclaim, unto the said second party, its successors and assigns, that certain lode mining claim, known as and called The Wide West, situate on George Gulch, near its junction with Canyon Creek, on the northeasterly slope thereof, as the same was located, recorded and is now held by the first parties, being in the Lalande Mining District, Shoshone County, Idaho; together with all the dips, spurs, and angles, and also all the metals, ores, gold

and silver-bearing quartz, rock and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, or to, the said premises, and every part and parcel thereof, with the appurtenances, to have and to hold all and singular the said premises, together with the appurtenances and privileges thereunto incident, unto the said party of the second part, its successors and assigns forever.

And do also grant, bargain, sell, convey and forever quitclaim, unto the said second party, its successors and assigns, the undivided one-half of the certain tract of land owned jointly by the first party and the Coeur d'Alene Silver-Lead Mining Company, a corporation, lying between what is called "the Tiger Overflow" and the John Stack boarding house, in the town of Burke, in the Lalande Mining District, Shoshone County, Idaho, to have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereunto incident, unto the said party of the second part, its successors and assigns, forever.

In Testimony Whereof, the said first parties of the first part, have hereunto set their hands and seals the day and year first above written.

STEPHEN S. GLIDDEN. [Seal]

SUE M. GLIDDEN. [Seal]

Signed, Sealed, and Delivered in presence of:

W. D. VINCENT.

WM. L. LUHN.

State of Washington, }
County of Spokane. } ss.

This is to certify that on this seventh day of October, A. D. 1895, before, me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally came Stephen S. Glidden and Sue M. Glidden, his wife, to me known to be the individuals described in and who executed the within instrument, and acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal, the day and year in this certificate first above written.

[Seal]

WM. L. LUHN,

Notary Public in and for the State of Washington, Residing, at Spokane, Washington.

Recorded at the request of W. T. Stoll, Oct. 17th, 1895, at 2 o'clock P. M.

BARRY N. HILLARD,

County Recorder.

By John P. Sheehy,

Deputy.

State of Idaho,
 County of Shoshone.

ss.

I, Horace M. Davenport, County Recorder in and for said County, do hereby certify that the foregoing copy of Deed has been by me compared with the original, and that it is a correct transcript therefrom as the same appears of record in Book "9" of Deeds, on page 465 thereof, at my office and in my custody.

In testimony whereof, I hereunto set my hand and affix my official seal this 28th day of September, A. D. 1901.

[Seal]

HORACE M. DAVENPORT,
 County Recorder.

By John P. Sheehy,
 Deputy.

[Endorsed]: (Certified Copy). Deed from Stephen S. Glidden and Sue M. Glidden, his wife, to The Consolidated Tiger & Poorman Mining Company. Plffs. Ex. 13.

Plaintiffs' Exhibit No. 14.

Mining Deed.

Whereas, at a meeting of the stockholders of the Coeur d'Alene Silver-Lead Mining Company, a corporation organized under the laws of the Territory, now State, of Montana, called by virtue of Sections 468 and 492, Chapter xxv of the Compiled Statutes of Montana, to consider a proposition to sell to the Consolidated Tiger & Poorman Mining Company, a corporation organized under the laws of the State of Washington, the following property, to wit: The Poorman mine, the undivided one-third ($\frac{1}{3}$)

of the O'Neil lode claim, the undivided one-half ($\frac{1}{2}$) of the Sheridan lode claim, and the undivided one-half ($\frac{1}{2}$) of that certain tract of land owned jointly by the Coeur d'Alene Silver-Lead Mining Company, and S. S. Glidden, and lying between the "Tiger Overflow" and the John Stack boarding house, all situate at the town of Burke, in the Lalande Mining District, Shoshone County, Idaho, together with the mill or concentrator, shops, sheds, ore houses, ore bins, machinery, appliances, improvements, dams, water courses, water rights, electric light plant, offices and manager's house, tools, and all the appurtenances thereunto belonging or therewith connected, and belonging to the Coeur d'Alene Silver-Lead Mining Company, at which more than three-fourths ($\frac{3}{4}$) of the Capital Stock of the said Coeur d'Alene Silver-Lead Mining Company was present and represented, and more than two-thirds of all said capital stock having voted in favor of selling said property, mining claims and premises to said Consolidated Tiger and Poorman Mining Company; and thereby, and by resolutions authorizing the undersigned president and secretary of the said Coeur d'Alene Silver-Lead Mining Company to make proper deeds of conveyance therefor;

Now, Therefore, in Consideration of the premises, this indenture made this 13th day of October, 1895, between the Coeur d'Alene Silver-Lead Mining Company, a corporation organized under the laws of the Territory, now State of Montana, party of the first part, and The Consolidated Tiger & Poorman Mining Company, a corporation, organized under the laws of the State of Washington, party of the second part.

Witnesseth: That the said party of the first part, for and in consideration of Five Hundred Thousand (500,000) shares of the Capital stock of the Consolidated Tiger & Poorman Mining Company of the par value of One Dollar (\$1.00) per share, the receipt of which is hereby acknowledged, has, and by these presents does grant, bargain, sell and convey unto the said party of the second part, its successors and assigns, all of the following described real estate, premises, mining claims, and property, all situated in the Lalande Mining District, Shoshone County, Idaho, and more particularly described as follows, to wit: The Poorman mine, a silver-lead mine, patented by the government of the United States to the first party by its letters patent dated 10th day of Jany., 1891, said patent being of record in the Recorder's office in the said Shoshone County, at Murray, Idaho, and said mines situate on the mountain sloping easterly from Canyon Creek immediately west of and adjoining the Tiger lode at the Town of Burke, said County and State, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the the said parties of the first part of, in or to the said

premises, and every part and parcel thereof with the appurtenances; together with the mill or concentrator called the Poorman Concentrator, the shops, sheds, ore houses, ore bins, machinery, and appliances thereto connected or thereunto belonging, situate in and about said mine and concentrator; also those certain water rights and dams, or water reservoirs on Canyon Creek above said town of Burke, owned by the first party, and by it used for conducting water to the said Poorman Mine, and to its electric light and power plant, or elsewhere, together with those water courses conducting the water from said reservoirs or dams to the plants for use; also that certain electric light plant connected with said Poorman mine and mill used to furnish light and power therefore, with the attachments, machinery, and appliances thereunto connected.

To have and to hold all and singular the premises, together with the appurtenances and privileges thereto incident unto the said party of the second part, its successors and assigns forever, the above bargained and granted lands and mines, premises and hereditaments, corporeal and incorporeal, in the quiet and peaceable possession of the said party of the second part, its successors and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said first party will warrant and defend.

And does also grant, bargain, sell, convey, and forever quitclaim unto said second party, its successors and assigns, the undivided one-third ($\frac{1}{3}$) of, in and to the O'Neil lode claim lying easterly of the said Poorman mine and

separated from the said Poorman mine heretofore described only by the Ella and Missing. Link fractions supposed to be on the Tiger-Poorman lode, also the undivided one-half ($\frac{1}{2}$) of the Sheridan lode claim lying south of and adjoining the Tiger mine and the Poorman mine, both said O'Neil and said Sheridan lodes lying and being in the County of Shoshone, State of Idaho, in the Lalande Mining District at the Town of Burke, on Canyon Creek, together with all the dips, spurs, and angles, and also all the metals, ores gold and silver-bearing quartz, rock and earth therein and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part of, in or to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises together with the appurtenances and privileges thereto incident unto the said party of the second part its successors and assigns forever.

And does also grant, bargain, sell, convey and forever quitclaim unto the second party, its successors and assigns those certain offices and residences used by it as the residence of its manager, and for its offices, situate on a little rise at the junction of Gorge Gulch with Can-

yon Creek, a short distance above the town of Burke, together with the land upon which the same stands; also the undivided one-half ($\frac{1}{2}$) of that certain tract of land owned jointly by the first party and S. S. Glidden, and lying between "The Tiger Overflow," and the John Stack boarding house, at the town of Burke, Lalande Mining District, Shoshone County, Idaho.

To have and to hold the same together with the appurtenances thereunto belonging unto the party of the second part, its successors and assigns forever.

In witness whereof its president has attached hereto the corporate name, and caused to be affixed the Corporate seal, the day and year above written.

THE COEUR d'ALENE SILVER-LEAD MINING CO.,

[Corporate Seal]

By B. C. KINGSBURY,

President.

ROBERT GRIX,

Secretary.

Signed, Sealed and Delivered in the presence of:

C. H. PALMER.

W. T. STOLL.

State of Montana, }
County of Silver Bow, } ss.

On this 12th day of October in the year 1895, before me, Joseph A. Lewis, a Notary Public, in and for the County of Silver Bow, State of Montana, personally appeared B. C. Kingsbury, known to me to be the President of the Coeur d'Alene Silver-Lead Mining Co., the Cor-

poration that executed the within instrument, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal the day and year first above written.

[Seal] JOSEPH A. LEWIS,
Notary Public, in and for the County of Silver Bow.

Recorded at the request of W. T. Stoll, Oct. 17, 1895,
at 2 o'clock P. M.

BARRY N. HILLARD,
County Recorder.
By Chas. A. Ervin,
Deputy.

On the margin of the Record appears the following note:

The Resolution of the Coeur d'Alene Silver-Lead Mining Company, authorizing the making of this Deed is of Record in Book "L" of Miscellaneous, at page 214 thereof of Records of Shoshone County, Idaho.

BARRY N. HILLARD,
County Recorder.
By Chas. A. Ervin,
Deputy.

State of Idaho, }
County of Shoshone. } ss.

I, Horace M. Davenport, County Recorder, in and for said County, do hereby certify that the foregoing copy of Deed, has been by me compared with the original, and

that it is a correct transcript therefrom as the same appears of record in Book "9" of Deeds, on page 461 thereof, at my office and in my custody.

In testimony whereof, I hereunto set my hand and affixing official seal this 28th day of September, A. D. 1901.

[Seal]

HORACE M. DAVENPORT,

County Recorder.

By John P. Sheehy,

Deputy.

[Endorsed]: (Certified Copy.) Of Deed from Coeur d'Alene Silver-Lead Mining Company, to The Consolidated Tiger and Poorman Mining Company. Plffs. Ex. 14.

Plaintiffs' Exhibit No. 15.

Mining Deed.

This Indenture made this 20th day of October, A. D. 1899, between Patrick Clark, of the City and County of Spokane, State of Washington, party of the first part, and the Buffalo Hump Mining Company, a corporation organized and existing under and by virtue of the laws of the State of New York, party of the second part.

Witnesseth: That the said party of the first part, for and in consideration of the sum of Three Thousand Dollars (\$3,000) Gold Coin of the United States, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise,

release and forever quitclaim unto the said party of the second part, its successors and assigns, an undivided one-half ($\frac{1}{2}$) interest in and to that certain mining claim known as the "Sheridan" situate in the Lalande Mining District, Shoshone County, State of Idaho; together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant or therewith usually had or enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

To Have and To Hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident unto the said party of the second part, its successors and assigns forever.

In Testimony Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

PATRICK CLARK. [Seal]

Signed, Sealed and Delivered in the presence of:

A. L. KEMPLOND.

CHASE KLEIN.

State of Washington, }
County of Spokane. } ss.

On this 20th day of October, A. D. 1899, before me, a Notary Public, in and for said County and State, personally appeared Patrick Clark, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Testimony Whereof, I have hereunto set my hand and official seal the day and year in this certificate above written.

[Seal] CHAS. S. ELTINGE,
Notary Public in and for the State of Washington, Residing at Spokane, Wash.

[U. S. I. R. 3.00 stamp attached.]

Recorded at the request of F. Lewis Clark, Oct. 21, 1899, at 2 o'clock P. M.

HORACE M. DAVENPORT,
County Recorder.

State of Idaho, }
County of Shoshone. } ss.

I, Horace M. Davenport, County Recorder in and for said County, do hereby certify that the foregoing copy of Deed has been by me compared with the original, and that it is a correct transcript therefrom as the same appears of record in Book "15" of Deeds, on page 31 thereof, at my office and in my custody.

In testimony whereof, I hereunto set my hand and affix

my official seal this 30th day of September, A. D. 1901.

[Seal]

HORACE DAVENPORT,

County Recorder.

[Endorsed]: (Certified Copy.) Of Deed from Patrick Clark to Buffalo Hump Mining Company. Recorded Oct. 21, 1899. Plffs. Ex. 15.

Plaintiffs' Exhibit No. 16.

Mining Deed,

This Indenture, made this 20th day of November, A. D. 1899, Between F. R. Culbertson of the County of Shoshone and State of Idaho, party of the first part, and the Buffalo Hump Mining Company of the County of ———, and State of New York, party of the second part, Witnesseth, That the said party of the first part, for and in consideration of the sum of One thousand & 00-100 Dollars, Gold Coin of the United States to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised and forever quitclaimed and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, their heirs and assigns the undivided one (1-5) fifth interest in the "Ella Fraction" and "Missing Link" Fraction Lode claims, as located, surveyed, recorded and held by said party of the first part, situated in Lalande Mining District, Shoshone County, Idaho, and bounded on the West by the Poorman Lode Claim and on the East by the O'Neal Lode claim, said claims, situated at Burke,

Idaho, in Lalande Mining District, Shoshone County, State of Idaho, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said part of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident unto the said party of the second part, their heirs and assigns forever.

In Testimony Whereof, The said party of the first part has hereunto set his hand and seal the day and year first above written.

F. R. CULBERTSON. [Seal]

Signed, Sealed and Delivered in the presence of:

WM. H. SMITH.

[U. S. I. R. \$11.00 stamp attached.]

State of Idaho, }
County of Shoshone. } ss.

I, Wm. H. Smith, a Notary Public, in and for said County and State, do hereby certify that on this 20th day

of November, A. D. 1899, personally appeared before me F. R. Culbertson, to me known to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

Given under my hand and official seal this 20th day of November, A. D. 1899.

[Seal]

WM. H. SMITH,

Notary Public in and for said County and State.

State of Idaho,)
County of Shoshone.) ss.

I hereby certify that the within instrument was filed for record in the office of the County Recorder of said County on the 9th day of December A. D. 1899, at 2 o'clock P. M. at the request of F. Lewis Clark, Treas.

HORACE M. DAVENPORT,

County Recorder.

State of Idaho,)
County of Shoshone.) ss.

I, Horace M. Davenport, County Recorder in and for said County, do hereby certify that the foregoing copy of Deed has been by me compared with the original, and that it is a correct transcript therefrom as the same appears of record in Book "15" of Deeds, on page 190 thereof, at my office and in my custody.

In testimony whereof, I hereunto set my hand and affix my official seal this 28th day of September, A. D. 1901.

[Seal]

HORACE DAVENPORT,

County Recorder.

By John P. Sheehy,

[Endorsed]: (Certified Copy.) Of Deed from F. R. Culbertson to Buffalo Hump Mining Company. Plffs. Ex. 16.

Plaintiffs' Exhibit No. 17.

General Manager's Report for the Year Ending April 30th, 1901.

Office of

EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY,

Stokes Building, 45 Cedar Street, New York.

Edwin Packard, President.

George Cox, Jr., Vice-President.

Bruce Clendenning, Treasurer.

F. J. Kilner, Secretary.

Chas. Sweeny, General Manager.

Gentlemen: Since my last annual report several important changes have taken place in the affairs of your Company.

In December of last year your Directors decided to increase the capital stock of the Company from 100,000 shares to 600,000 shares of the par value of \$10 per share. This for the purpose of acquiring other properties and placing ourselves in a position to command a leading place in the lead markets of this country.

In January of this year we purchased the Tiger-Poorman mines, at Burke, Idaho, which were formerly operated by the Buffalo Hump Mining Company, the consideration being \$2,100,000, payable in stock of your company at par. In the new capitalization the share-

holders of the Empire-State Idaho Mining and Developing Company were allowed three shares of stock for each share previously held; 90,000 shares remain in the treasury of your company as a reserve fund. The Tiger-Poorman properties are now worked in connection with your properties at Wardner under one management, thereby effecting a considerable saving in the general operating expenses of the two properties.

I recall your attention to the fact that at the present time your company is the largest lead producer in the United States, if not in the world, having a shipping capacity of over 4,000 tons of concentrates per month, or, say, yearly shipments of about 50,000 tons. This is equal to 25 per cent. of the entire output of the Coeur d'Alene lead district, which section of the country is recognized as producing at least 50 per cent. of the lead output of the United States. In other words, your company is able to furnish about one-eighth of the entire lead output of the United States, and is in a position to secure the best market prices for our product.

WARDNER MINE.

The operations at Wardner have been satisfactory throughout the year, and our shipments from that point have shown a steady increase, being from May 1st, 1900, to May 1st, 1901, 22,480 tons, against 17,864 tons for the year previous. Development work throughout the mine has been well advanced during the year, and the property is in better shape to-day than ever before to economically handle the ore as well as to increase the output, the principle development work during the year being the con-

tinuation of the Sweeny tunnel a distance of 942 feet through the mountain, coming out at the surface in Deadwood Gulch. This Sweeny tunnel from portal to portal is 5,500 feet long. The tunnel has been laid with 30 pound T-rails, and will be used as the main passage-way for the outlet of the ore to the new mill that has been built during the year at the mouth of Government Gulch, the ore from the mine being dumped direct into the ore bins at the mouth of the new tunnel, and from there transported by railroad to the new mill, these two points having been connected with a branch of the Oregon Railroad and Navigation Company by a spur track 4 miles long. The railroad spur will not be ready for traffic before June 1st, 1901, after which time a material reduction in mining expenses will be made, owing to the fact that wagon transportation for mining supplies will be done away with, the railroad delivering the mine timbers, lumber, and fuel direct to the mouth of the tunnel, making a saving over wagon freights, as heretofore, of over \$10,000 per year.

A shaft to the depth of 150 feet has been sunk on the vein during the year, and the ore bodies at this depth are now being opened up. The showing is all that we could hope for, and the ore now being put in sight on this 150 foot level has largely added to our ore reserves. Prospecting has been vigorously pushed from the upper levels into what is known as the hanging wall country, and this development has opened up new ore bodies not heretofore worked. The new ore bodies have been sufficiently developed at different points between the Sweeny

level and the upper workings, a distance of something over 600 feet in height, to show that they are continuous between these two points, and have added very largely to our ore reserves.

The total amount of new development work done during the year in running new drifts, sinking and raising, has aggregated 6,675 feet of work, all of which has been satisfactory in every way. In addition to the above mentioned 6,675 feet of work there has been 801 feet of diamond drill work driven southerly and westerly from the west Sweeny tunnel. This diamond drill work has cut some new ore, but at this date, it has not been sufficiently opened up to fully determine the extent and size of the new ore bodies found by the diamond drill.

The New Empire tunnel, which was started last year, and will when finished cut the vein 650 feet vertically below the Sweeny tunnel and giving nearly 1,000 feet of stoping ground on the vein, has been driven during the year a distance of 679 feet. Work on this was temporarily suspended in October, owing to the fact that the development work in the mine (before referred to) had so largely added to our ore reserves that it removed the necessity of crowding this work until such time as we saw fit to take it up again.

NEW EMPIRE MILL.

A new concentrating mill has been constructed during the past year on the line of the Oregon Railroad and Navigation Company, at the mouth of Government Gulch, and connected with the mine by the branch road or spur before referred to. As soon as this branch is

completed for traffic (about June 1st) the new mill will be started up. The main buildings have been built for a capacity of 800 tons of crude ore per day of twenty-four hours, but for the present new machinery sufficient only to handle 400 tons per day has been installed, the intention being to dismantle the old mill now in operation at Wardner and remove such portions of the old machinery as can be utilized in increasing the capacity of the new mill. This new plant is a modern, up to date mill, fitted with the latest and most approved concentrating machinery. A close saving of the metal values as well as an economical handling of the ores is expected from the same.

The mill has been arranged to run by either steam or water power, but for the present will be operated by steam. Ore bins of sufficient capacity for several days' run of the concentrator has been provided for, both at the mill and at the mouth of the Sweeny tunnel, in order to prevent any shutting down should there be any temporary delay in the operation of the railroad.

The total cost of the new mill to May 1st has been \$55,074.83, including the cost of the mill ore bins. To this will be added the cost of the ore bins at the mouth of the Sweeny tunnel, construction of which has been delayed owing to the railroad not having been able at this date to deliver the lumber for the same at the mouth of the tunnel.

In the old mill at Wardner the only new machinery added during the past year has been two double-deck Wilfley tables. These will be removed to the new mill

after the same is started up. The work of the old mill has been fairly satisfactory, excepting that there has been a shortage of slime capacity, which is fully remedied in the new plant.

During the last year 131,668 tons of crude ore have been milled, producing 17,603 tons of concentrates, being an average of 8 tons of milling ore to 1 ton of concentrates.

In addition to the concentrates produced the mine has also shipped 4,877 tons of first-class ore, making the total shipments from this property for the year 22,480 tons, or a total gross value for the lead and silver contents of \$1,316,175.85.

Average shipments assayed 62.26 per cent lead and 23½ ounces of silver per ton.

The average price received for the lead during the year was 4 cents per pound, and the average price received for silver was 61.8 cents per ounce. The average price for lead was 46-100 c. less per pound than the year previous, while the average price for silver was 2.36 cents higher per ounce, covering the same period.

The average number of men employed during the year in the mine, mill, office, and construction (outside of contract work on the Empire tunnel and the flume) was 223 men, and the daily average wages paid these men was \$3.53 each per shift.

PINE CREEK FLUME.

In my last annual report I referred to a flume to be built from the forks of Pine Creek, to furnish water and power for the new mill. This enterprise was started and

work prosecuted upon it until the latter part of October, when operations were suspended for the winter.

The new mill has been equipped with a steam plant and sufficient wash water for the mill has been secured elsewhere. It is also probable that in the near future a central electric power plant for the entire district will be inaugurated. If this is done the power can be furnished at a less expense than would be involved in the completion of the flume, and for this reason it was thought best to defer operations on this enterprise until later on.

PROPERTIES.

The properties now embraced in the Wardner district and held by your company number seventy-two claims and fractions of claims; twenty-one of these are held under patent from the Government; title to same being undisputed. On some of our other claims we have had continued litigation. At final adjudication the result has been in each case in our favor. During the past year, all decisions, with the exception of ore, have been satisfactory to us, this exception being a minor matter, and in the opinion of counsel certain to be reversed and decided in our favor on appeal. The decisions in our favor, if confirmed as we fully expect them to be, will be of great value to us in future years, affecting as they do ore bodies below our present workings and adding largely to the territory which is unquestionably ours.

A large number of the unpatented claims have been surveyed and patent applied for, and the balance will be

put into shape as soon as the necessary work can be done and patent papers secured on same.

In addition to the mining claims held by the company, we have 120 acres of patented land in Government Gulch, at the mouth of the Empire tunnel; 320 acres of patented land upon which is situated our new mill; also 120 acres of patented land at the mouth of Big Creek.

In addition to the above is one new concentrating plant just completed; one old concentrating plant in fair condition, a large compressor plant in first-class condition, mine offices, timber sheds, ore bins, blacksmith and carpenter shops, machine shops, and all the necessary out-buildings for the successful working of the property in the most economical manner.

BURKE BRANCH.

The Tiger-Poorman properties, situated at Burke, Idaho, and recently acquired by this company, consists of eighteen mining claims and fractions of claims, and cover a linear distance on Tiger and Poorman veins of 10,952 feet. Sixteen of these claims are patented, to which title is held by your company from the Government.

In addition to the above mineral claims your company are the owners of four water rights in connection with this property, which are improved and are used for power purposes and wash water for the concentrator.

The surface improvements in connection with this property consist of a 600 ton concentrating plant, arranged to run by water and steam power; a boiler plant, with 1,200 Horse Power; an electric power plant of 400 horse power capacity, which electric power is used for

operating the underground pumps; machine shops, blacksmith and carpenter, a well equipped hoisting plant of sufficient capacity to hoist 600 tons of ore per day to a vertical depth of 2,500 feet, together with the necessary outbuildings, sheds, etc., which go toward making the plant one of the most complete in all details in the Coeur d'Alene district.

This property, while operated by the Consolidated Tiger & Poorman Mining Company, owing to the loss of their surface improvements by fire, in 1896, which placed them in a bad condition financially, had been allowed to get behind in development work in the mine, and the property in a general way was in bad shape for its successful working. After the Buffalo Hump Mining Company secured it, and on the strength of the extensive new ore bodies and additional ore reserves put in sight by their development work, they increased the mill to 600 tons capacity in twenty-four hours, adding considerable machinery to the plant in the way of additional slime machinery for the mill, a new electric power plant with low flume; also put in an additional boiler capacity and additional hoisting facilities in the way of skips, put up a boarding house and other buildings, and had expended in the way of betterments to the property in improvements, additional machinery and development work in opening up new ore bodies something over \$100,000.

The property at the time it came into your possession being complete in every respect, there will be nothing

further needed in the way of improvements or additional machinery for some time to come.

Since January 1st, 1901, the mines have been in full operation until April 13th, since which time only one shift has been worked, the working of one shift being occasioned by a temporary over-production in the lead markets, and an arrangement having been entered into with the smelting companies with a view of curtailing the output of the Coeur d'Alene district until such time as this surplus could be used up. It was decided to make this reduction of output at the Burke end and run Wardner mines at full capacity. While this curtailment of product will somewhat reduce the profits of operations, owing to a certain amount of fixed charges which cannot be reduced in proportion to the reduction of the output, the Smelting Company has made us a liberal allowance on account of our voluntarily assisting them in bringing about this reduction in the surplus of lead on hand and the allowance received from the Smelting Company in addition to profits on the shipments, will enable us to keep up our regular monthly dividends.

During the four months from January 1st, 1901, to May 1st, 1901, the mill produced 6,684 tons of concentrates from 64,872 tons of ore; in addition to which there was shipped 165 tons of first-class ore.

The average shipments assayed 55.974 per cent lead and 25.755 ounces of silver per ton.

The average number of men employed in the operation of the property during the four months, 275 per day, and the average wages paid per shift was \$3.65.

During the last half of April, while only one shift was being worked, the average number of men employed was 145 per day, and this will be about the number of men employed until such time as we start up the property in its full capacity.

DEVELOPMENT.

During the last four months there was 1,054 feet of development work done, including the sinking of the main shaft 87 feet. This working shaft is now 1,700 feet deep from the collar of same. We have just cut our 1,700 work station, and are cross-cutting for the vein, the vertical distance between the 1,600 and the 1,700 feet levels, being 150 feet. This new level which we will get opened up some time in July, will give us an additional reserve of something over a year's supply of ore. There is nothing in the lowest workings to show any decrease in the values of the ore or in the quantity, and with cheap electric power later on, for pumping and general purposes, there is no reason why this property should not be worked profitably to a depth of 5,000 feet.

In this connection and in reference to our Wardner properties I might say that the Bunker Hill & Sullivan Mining Company, whose properties adjoin ours at Wardner, have within the last four months cut their vein with a deep working tunnel, cutting their ore bodies at the same depth that our Empire State tunnel will cut ours, and giving them (as our tunnel will give us when completed) something over 1,000 feet of stoping ground on the vein; this new Bunker Hill tunnel has opened up a fine body of high grade ore. Our claims adjoining each

other, as they do, and the same ore bodies passing through both bodies, this practically demonstrates the value of our ore bodies at this depth, assuring us a long life ahead for our Wardner properties.

For a full statement of our financial affairs, showing total receipts and disbursements for the year ending April 30th, 1901, I beg to refer you to our Treasurer's report, which will be given to you at this meeting.

Respectfully submitted,

CHARLES SWEENEY,

General Manager.

May 21st, 1901.

Plaintiffs' Exhibit No. 18.

Mining Deed.

This Indenture made the 7th day of September, in the year of Our Lord one thousand nine hundred, between Eleanor Truax O'Neil, widow of Charles W. O'Neil, late of Shoshone County, State of Idaho, by B. D. Crocker, her attorney in fact, the party of the first part, and the Buffalo Hump Mining Company, a corporation organized and existing under the laws of the State of New York, and doing business in said Shoshone County, the party of the second part,

Witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to her in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, has granted, bargained,

sold, and conveyed and by these presents does grant, bargain, sell, and convey unto the said party of the second part, and to its successors and assigns forever, all of the right, title and interest of the party of the first part in and to that certain quartz lode mining claim commonly known as and called "The O'Neil Lode Mining Claim," situated in the Lalande Mining District, Shoshone County, State of Idaho, and being the interests in said mining claim more fully described in that certain deed executed and delivered by W. J. Tretheway to said Charles W. O'Neil on the 20th day of May, A. D. 1892, which said deed was recorded in the County Recorder's office of said Shoshone County, on the 25th day of May, 1892, in Book "X" of Deeds, at page 612 thereof, and also that certain other deed made, executed and delivered by said W. J. Tretheway to said Charles W. O'Neil on the 8th day of June, 1892, which said deed was recorded on the 22d day of June, A. D. 1892, in the County Recorder's office of said Shoshone County, in Book "Y" of Deeds, at page 227 thereof. For a more particular description of said quartz lode mining claims reference is hereby made to the record of the United States Patent therefor duly recorded in said County Recorder's office on the 22d day of June, A. D. 1894, in Book 6 of Deeds, at page 429 thereof.

This instrument is executed and delivered by the said party of the first part for the purpose of making more definite and certain the description of the property intended to be conveyed by that certain deed of conveyance executed and delivered by the said party of the first part,

by the said B. D. Crocker, her Attorney in Fact, on the 29th day of September A. D. 1899, which said deed was duly recorded on the 21st day of October, A. D. 1899, in Book 15 of Deeds, at page 29 thereof, records of said Shoshone County, by which deed it was intended to convey to the said party of the second part all the right, title and interest in said above described property formerly owned by Charles W. O'Neil, and which deed in describing the source of said Charles W. O'Neil's title, referred only to the first of the deeds from W. J. Tretheway above mentioned and not the the second thereof, as it should have done in order to make said reference complete and true.

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant or appurtenant or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereunto belonging, and the rents, issues and profits thereof; and also all the estate, right, title, possession, claim and demand whatsoever, as well in law as in equity, and as well in possession as in expectancy, of the said party of the first part, in and to the above granted premises, and every part and parcel thereof.

To have and to hold, all and singular the said above granted premises, with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors and assigns forever.

In Witness Whereof, the said party of the first part

has hereunto set her hand and seal, by B. D. Crocker, her attorney in fact, the day and year first above written.

ELEANOR TRUAX O'NEIL. [Seal]

By B. D. CROCKER, [Seal]

Her Attorney in Fact.

Signed, Sealed and Delivered in the presence of:

FRANCIS A. GARRICHT.

State of Washington, }
County of Walla Walla. } ss.

On this 7th day of September A. D. 1900, before me, Francis A. Garrecht, a Notary Public for the State of Washington, residing at Walla Walla, Washington, personally appeared B. D. Crocker, known to me to be the person whose name is subscribed to the within instrument, as the Attorney in Fact of Eleanor Truax O'Neil, and acknowledged to me that he subscribed the name of Eleanor Truax O'Neil thereto as principal and his own name as attorney in fact.

In Testimony Whereof, I have hereunto set my hand and official seal at my office in Walla Walla, Washington, the day and year in this certificate above written.

[Seal]

FRANCIS A. GARRICHT,

Notary Public for the State of Washington, residing at
Walla Walla, Washington.

Recorded at the request of Heyburn, Heyburn & Doherty, September 10th, 1900, at 2 o'clock P. M.

HORACE M. DAVENPORT,

County Recorder.

State of Idaho, }
 County of Shoshone. } ss.

I, Horace M. Davenport, County Recorder in and for said County, do hereby certify that the foregoing copy of Deed has been by me compared with the original and that it is a correct transcript therefrom as the same appears of record in Book "18" of Deeds, on page 204 thereof, at my office and in my custody.

In testimony whereof, I hereunto set my hand and affix my official seal this 28th day of September, A. D. 1901.

[Seal]

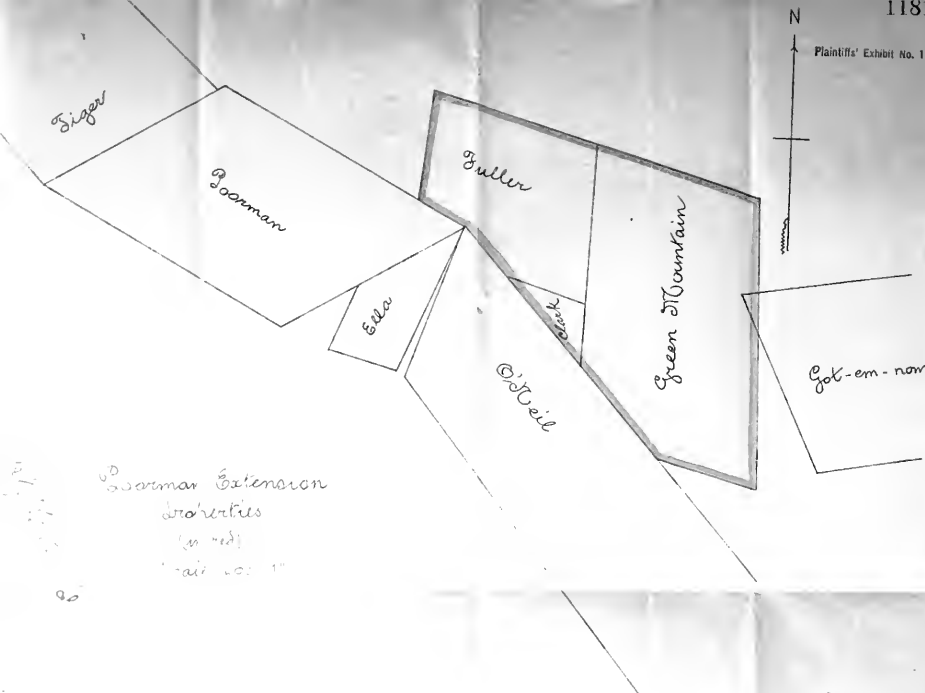
HORACE M. DAVENPORT,

County Recorder.

By John P. Sheehy,

Deputy.

[Endorsed]: (Certified Copy.) Of Deed from Eleanor Truax O'Neil, by B. D. Crocker, her Attorney in Fact, to Buffalo Hump Mining Company. Plffs. Ex. 18.



Poorman Extension
 (in red)
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County of :

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[Seal]

[Endorse
Truax O'Ne
Buffalo Hu

Plaintiffs' Exhibit No. 20.

Mining Deed.

This Indenture made this September 29th, 1899, by and between Eleanor Truax O'Neil, of the County of Spokane and State of Washington, party of the first part, and the Buffalo Hump Mining Company of the State of Idaho, a corporation doing business in the State of Idaho, party of the second part.

Witnesseth: That for and in consideration of the sum of Five Thousand (\$5000.00) Dollars to her in hand paid by the party of the second part, in gold coin of the United States, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part, its successors and assigns, all the right, title and interest of the party of the first part in and to that certain quartz lode mining claim known as "The O'Neil Lode Mining Claim," as located, surveyed and recorded, and situated in the Lalande Mining District of Shoshone County, State of Idaho, and being her interest in that certain mining claim more fully described in a deed given by one W. J. Tretheway to Charles W. O'Neil, and recorded in the Recorder's office of said Shoshone County, in Book "X" of Deeds at page 613 and the location notice of which was recorded in Book B. of Quartz Locations at pages 336 to 337, in said Recorder's Office, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth

therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant or therewith usually had and enjoyed; also all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the rents, issues and profits thereof; and also, all the estate, right title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first, of, in, or to, the said premises; and every part and parcel thereof with the appurtenances.

To Have and to Hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto said party of the second part, its heirs and assigns forever.

In Testimony Whereof, the said party of the first part, has hereunto set her hand and seal the day and year first above written.

ELEANOR TRUAX O'NEIL [Seal]

By B. D. CROCKER,

Her Atty. in Fact.

Signed, Sealed and Delivered in the presence of:

SAML. R. STERN,

CHAS. P. LUND.

[U. S. I. R. \$5.00 stamp attached.]

State of Washington, }
County of Spokane. } ss.

I, Samuel R. Stern, a Notary Public in and for the above County and State, do hereby certify that on this September 29th, 1899, before me, personally, appeared

B. D. Crocker, personally known to me to be the same person, whose name is subscribed to the within instrument, as the attorney in fact of Eleanor Truax O'Neil, and said B. D. Crocker duly acknowledged to me that he subscribed the name of the said Eleanor Truax O'Neil thereto, as principal and his own name as attorney in fact; and that he so executed the same by virtue of the power of attorney duly authorizing him to execute the same, given to the said B. D. Crocker by the said Eleanor Truax O'Neil, and that he executed the same in her behalf for the uses and purposes therein mentioned.

Witness my hand and Notarial Seal, the day and year in this certificate first written.

[Seal]

SAML. R. STERN,

Notary Public Residing at Spokane, Washington.

Recorded at the request of F. Lewis Clark, Oct. 21, 1899, at 2 o'clock P. M.

HORACE M. DAVENPORT,

County Recorder.

State of Idaho, }
County of Shoshone. } ss.

I, Horace M. Davenport, County Recorder in and for said County, do hereby certify that the foregoing copy of Deed has been by me compared with the original and that it is a correct transcript therefrom as the same appears of record in Book "15" of Deeds, on page 29, thereof, at my office and in my custody.

In testimony whereof I hereunto, set my hand and

affix my official seal this 28th day of September, A. D. 1901.

[Seal]

HORACE M. DAVENPORT,
County Recorder.

B y John P. Sheehy,
Deputy.

[Endorsed]: (Certified Copy.) "Deed." Eleanor Truax O'Neil, by D. B. Crocker, her Attorney in Fact, to Buffalo Hump Mining Company. Plffs. Ex. 20. E. J. L.

Plaintiffs' Exhibit No. 21.

Agreement.

Know all men by these presents: That I, Eleanor Truax O'Neil, of Spokane, Washington, By B. D. Crocker, my attorney in fact; have this day; for a valuable consideration, the receipt of which is hereby acknowledged, given to the Standard Mining Company an option to purchase all my right, title and interest in and to the following claims, situated in Lalande Mining District, Shoshone County, State of Idaho, to wit: The Mammoth, Tariff, Saturday Fraction, Walter Mackay, Grey Copper, Grey Copper Fraction, Selkirk and portions of Sancho and Snow Line claims respectively, such option being evidenced by a written agreement in escrow at the Exchange National Bank of Spokane Falls, a national banking corporation, doing business at Spokane, Washington, and that upon a compliance with the terms of said escrow, the said Standard Mining Company is entitled to a deed to the property hereinbefore referred to.

I further certify herewith that I have for a valuable consideration, the receipt whereof is hereby acknowledged, also given an option to A. B. Campbell, of Spokane, Washington as trustee, to purchase all my right, title and interest in and to the claims situated in the same mining district known as the Ore-or-no-go and O'Neil lode mining claims, the payment therefor being provided for in the same option given with respect to the claims hereinbefore mentioned and upon a compliance with the terms of said escrow, I have agreed to, and will deed all of the above-entitled properties to the said Standard Mining Company and said A. B. Campbell, as trustee, respectively.

In Witness Whereof, I have set my hand and seal by B. D. Crocker, my attorney at fact, this 20th day of April, 1899.

ELEANOR TRUAX O'NEIL,

By B. D. CROCKER,
Her Attorney in Fact.

Witness:

SAML. R. STERN.

RUBY R. MARBLE.

State of Washington, }
County of Spokane. } ss.

On this 21st day of April, A. D. 1899, before me Samuel R. Stern, a Notary Public in and for said County and State, personally appeared B. D. Crocker, personally known to me to be the same person whose name is subscribed to the within instrument as the attorney in fact of Eleanor Truax O'Neil, and said B. D. Crocker duly

acknowledged to me that he subscribed the name of the said Eleanor Truax O'Neil thereto as principal and his own name as attorney in fact, and that he subscribed to the within instrument and acknowledged that he executed the same as the act and deed of the said Eleanor Truax O'Neil and as her attorney in fact, and for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto set my hand and official seal the day and year in this certificate first above written.

[Seal]

SAMPL. R. STERN,

Notary Public Residing at Spokane, Washington.

[U. S. I. R. Stamp 10 cts. attached.]

Recorded at the request of H. R. Allen, May 17, 1899,
at 2 o'clock P. M.

HORACE M. DAVENPORT,

County Recorder.

By Chas. W. Betts,

Deputy.

State of Idaho,

County of Shoshone.

} ss.

I, Horace M. Davenport, County Recorder in and for said County, do hereby certify that the foregoing copy of Agreement has been by me compared with the original and that it is a correct transcript therefrom as the same appears of record in Book "D" of Bonds and Agreements, on page 384 thereof, at my office and in my custody.

In testimony whereof, I hereunto set my hand and

affix my official seal this 28th day of September A. D. 1901.

[Seal]

HORACE M. DAVENPORT,
County Recorder.
By John P. Sheehy,
Deputy.

[Endorsed]: (Certified Copy.) Of Agreement Between Eleanor Truax O'Neil, by her Attorney in Fact B. D. Crocker, and The Standard Mining Company and A. B. Campbell. Plffs. Exhibit 21. E. J. L.

Plaintiffs' Exhibit No. 22.

Abstract of Certificates issued to the Ella Mining Co. for ore shipped by them and sampled by the North Western Sampling and Milling Co., Wallace, Idaho.

Lot No. 1, Jan. 5th, 1895.

Gross Wt. Net Wt. Pb. Ag.

80.230 79.430 66.3 36.4..47395.78 lbs.

Lead at \$3.00 equals 1,421.78. 1373.345 oz. ag.

59 $\frac{3}{4}$ equals, 820.57, total..... 2242.44

Lot No. 2, Jan. 12th, 1895.

Gross Wt. Net Wt. Pb. Ag.

101.260 100.250 66.2 37.7..59728.95 lbs.

Lead at \$3.00 equals 1791.86. 1795.227 oz. ag. at

59 $\frac{3}{4}$ equals 1072.64. Total..... 2864.50

Lot No. 3, Jan. 18th, 1895.

Gross Wt. Net Wt. Pb. Ag.

90740. 89.830 66.8 38.9..54005.8 lbs.

Lead at \$3.02 equals 1633.67. 1659.834 oz. ag.

at 59 $\frac{3}{4}$ equals 991.75. Total..... 2625.42

Lot No. 4, Feb. 9th, 1895.

Gross Wt. Net Wt. Pb. Ag.

82.260 82.100 66.0 35.0 . . 48.767.40 lbs.

Lead at \$3.02½ equals 1475.21. 1.364.913 oz. ag.

at 59½ equals 812.12. Total..... 2287.33

10019.69

Less Freight and Treatment on 354.490 lbs.

equals 177.490 Tons at \$25.00 per ton..... 4431.12

5588.57

April, 1895, shipped to Helena (2 cars) 40 tons

est..... 1484.80

Sept., 1895, shipped to Tacoma, 65.1109, value. 2790.34

Royalty from Lease to Poorman, as per state-

ment.....6661.07

Total.....16524.78

Total Shipments 283 Tons.

Plaintiffs' Exhibit No. 23.

The Coeur D'Alene S. L. Co., in Account with The Ella
Mining Co.

1895.		DR.	
Feb.	15th.	To Ore Bought	1026.44
Mch.	15th.	"	1824.35
Apl.	15th.	"	1087.22
May	15th.	"	87.25
June	15th.	"	600.19

July	15th.	”	442.87
August	15th.	”	484.50
Sept.	13th.	”	983.75
Oct.	12th.	”	124.50
			<hr/>
			6661.07

1895.

CREDIT.

Feb.	15th.	By Check on Hoge, B. & Co.	1026.44
Mch.	15th.	”	1824.35
April	15th.	”	1087.22
May	15th.	”	87.25
June	15th.	”	600.19
July	15th.	”	442.87
Aug.	15th.	”	484.50
Sept.	13th.	”	983.75
Oct.	15th.	”	124.50
			<hr/>
			6661.07

Plaintiffs' Exhibit No. 24.

Escrow Memorandum.

This deed deposited herewith in the custody of the Exchange National Bank of Spokane, as the custodian designated by the party hereto, viz: David Holzman of Spokane, Washington, and Patrick Clark of the same place is a conveyance of the undivided one-third of that certain lode mining claim known as the "O'Neil" lying in Lalande Mining District, Shoshone County, Idaho, as

described in the patent issued therefore by the United States to the owners thereof.

This conveyance will be delivered to the grantors named therein on the following conditions:

The said Clark, in consideration of these presents, agrees to pay said Holzman the sum of Five thousand (\$5,000.00) Dollars within three days after this date, after which he is authorized to enter into and work said mining ground and not before. If the said Clark shall make said payment as aforesaid and shall within five months from February the 28th, 1895, deposit to the credit of said grantor for said deed the further sum of Twenty-five Hundred Dollars (\$2500.00) making Seven thousand five hundred dollars (7500.00) in all, then the said custodian is directed to deliver said conveyance to said Clark to take effect from its date.

If said Clark shall fail to make the second payment of Twenty-five hundred dollars (\$2500.00) at the time and in the manner aforesaid, then said custodian shall re-deliver said conveyance to the grantor, Holzman, on demand, and the same shall be void, and in case of such failure all moneys paid by said Clark shall be retained by said Holzman as agreed and liquidated damages and to compensate him for entering into this agreement.

Dated this 25th day of February, 1895.

PATRICK CLARK.

DAVID HOLZMAN.

Witness:

J. A. FINCH.

Filed for record at the request of Patrick Clark,
March 1st, A. D. 1895, at 5 o'clock P. M.

BARRY N. HILLARD,
County Recorder.
By Chas. A. Ervin,
Deputy.

State of Idaho, }
County of Shoshone. } ss.

I, Horace M. Davenport, County Recorder in and for said County, do hereby certify that the foregoing copy of Escrow Memorandum has been by me compared with the original and that it is a correct transcript therefrom as the same appears of record in Book "C" of Bonds and Agreements, on page 611 thereof, at my office and in my custody.

In testimony whereof, I hereunto set my hand and affix my official seal this 17th day of October, A. D. 1901.

[Seal]

HORACE M. DAVENPORT,
County Recorder.
By John P. Sheehy,
Deputy.

[Endorsed]: (Certified Copy.) Escrow Memorandum between Patrick Clark and David Holzman, for a $\frac{1}{3}$ interest in the O'Neil lode, Lalande District, Shoshone County, Idaho. Plffs. Ex. 24. C. H. S.

Plaintiffs' Exhibit No. 25.**Mining Deed.**

This indenture made the twenty-fifth day of March, A. D. 1895, between David Holzman of the city of Spokane in Spokane County, State of Washington, the party of the first part and Patrick Clark of the City of Spokane in the State of Washington, the party of the second part, Witnesseth: That the said party of the first part for and in consideration of the sum of Twenty-five hundred (\$2500) Dollars lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and other valuable consideration has granted, bargained, sold, remised, released and forever quitclaimed and by these presents does grant, bargain, sell, remise and forever quitclaim unto said party of the second part, and to his heirs and assigns. An undivided one-third interest in and to the O'Neil lode mining claim, situated in Lalande Mining District, Shoshone County, State of Idaho, being the same mining claim designated as Lot number 50 and conveyed by the United States of America to J. N. Russell, Charles W. O'Neil and John P. O'Neil by deed dated the Seventeenth day of May, A. D. 1894, and recorded on page 429 et seq. of Book 6 of Deeds in the Recorder's Office of said Shoshone County on the 22d day of June, A. D. 1894, to the description of the mining claim in which reference is hereby made as a part of this instrument.

Together with all the dips, spurs and angles and also

all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever as well in law as in equity of the said party of the first part of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident unto the said party of the second part, his heirs and assigns forever.

In Witness Whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

DAVID HOLZMAN. [Seal]

Signed, Sealed and Delivered in presence of:

A. G. AVERY.

State of Washington, }
County of Spokane. } ss.

On this 25th day of March, A. D. 1895, before me, A. G. Avery, a Notary Public in and for said County, personally appeared David Holzman, personally known by me to be the person whose name is subscribed to the within instrument and acknowledged to me that he exe-

cuted the same freely and voluntarily for the uses and purposes herein set forth.

In Witness Whereof I have hereunto set my hand and affixed my official seal at my office in Spokane the day and year in this certificate first above written.

[Seal]

A. G. AVERY,

Notary Public, Residing at Spokane, Washington.

Recorded at the request of Patrick Clark, Mar. 1895, at 4 o'clock P. M.

BARRY N. HILLARD,

County Recorder.

By Chas. A. Ervin,

Deputy.

State of Idaho,

County of Shoshone.

} ss.

I, Horace M. Davenport, County Recorder in and for said County, do hereby certify that the foregoing copy of Deed has been by me compared with the original and that it is a correct transcript therefrom as the same appears of record in Book "9" of Deeds, on page 166 thereof, at my office and in my custody.

In testimony whereof, I hereunto set my hand and affix my official seal this 17th day of October, A. D. 1901.

[Seal]

HORACE M. DAVENPORT,

County Recorder.

John P. Sheehy,

Deputy.

[Endorsed]: Certified Copy. Deed from David Holtzman to Patrick Clark, for $\frac{1}{3}$ interest in the O'Neil lode, Lalande Mining District, Shoshone County, State of Ida. Plffs. Ex. 25, C. H. S.

Plaintiffs' Exhibit No. 26.

Mining Deed.

This Indenture made this 26th day of March in the year of our Lord One thousand eight hundred and ninety-five, between Patrick Clark of Spokane, Washington, party of the first part and the Coeur d'Alene Silver-Lead Mining Company, a Corporation organized under the laws of the State of Montana, the party of the second part, Witnesseth: That the said party of the first part, for and in consideration of the sum of One (1) Dollars, lawful money of the United States of America, to him in hand paid the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, conveyed and quitclaimed, and by these presents does grant, bargain, sell, remise, release, convey and quitclaim unto the said party of the second part and to its successors and assigns forever, all the right, title and interest, estate, claim and demands, of said party of the first part, of, in and to that certain portion, claim and mining right, title and property on that certain ledge, vein, lode, or deposit of quartz and other rock in place, containing precious metals of gold, silver and other metals, and situated in the Lalande Mining Dis

trict, County of Shoshone and State of Idaho, and described as follows, to wit: An undivided $\frac{1}{3}$ (one-third) interest in and to the O'Neil lode mining claim, being the same mining claim designated as lot No. 50 and conveyed by the United States of America to J. N. Russell et al., on the 17th day of May, 1894, and recorded on page 429 et seq., of Book 6 of Deeds in the Recorder's Office of Shoshone County on June 22d, 1894, and being the same property conveyed to this grantor by David Holzman on the 25th day of March, 1895.

Together with all the dips, spurs and angles, and also all the metals, ores, gold, silver and metal-bearing quartz rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant or therewith usually had and enjoyed; and also all the estate, right, title, interest, possession, claim and demand whatsoever of the said party of the first part, of, in or to the premises and every part and parcel thereof.

To have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

PATRICK CLARK. [Seal]

Signed, Sealed and Delivered in the presence of:

S. P. DOMER.

F. E. LUCAS.

State of Washington, }
County of Spokane. } ss.

This is to certify that on this 20th day of July, A. D. 1895, before me, S. P. Domer, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally came Patrick Clark, to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

And the said ———— wife of said ———— upon an examination by me, separate and apart from her said husband, when the contents of said instrument were by me fully made known unto her, and she was by me fully appraised of her rights and the effect of signing the within instrument, did freely and voluntarily, separate and apart from her said husband, acknowledge the same, acknowledging that she did voluntarily, of her own free will, and without fear of or coercion from her husband, execute the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal]

S. P. DOMER,

Notary Public, in and for the State of Washington, Residing at Spokane, Wash.

State of Idaho, }
 County of Shoshone } ss.

I hereby certify that the within instrument was filed for record in the office of the Recorder of Shoshone County, Idaho, at the request of Patrick Clark on the 22d day of July, A. D. 1895, at 30 min. past 2 o'clock P. M.

BARRY N. HILLARD,
 County Recorder.
 By Chas. A. Ervin,
 Deputy.

State of Idaho. }
 County of Shoshone. } ss.

I, Horace M. Davenport, County Recorder in and for said County, do hereby certify that the foregoing copy of Deed has been by me compared with the original and that it is a correct transcript therefrom as the same appears of record in Book "9" of Deeds, on page 342 thereof, at my office and in my custody.

In testimony whereof, I hereunto set my hand and affix my official seal this 17th day of October, A. D. 1901.

[Seal] HORACE M. DAVENPORT,
 County Recorder.
 By John P. Sheehy,
 Deputy.

[Endorsed]: Certified Copy. Deed from Patrick Clark, to Coeur d'Alene Silver-Lead Mining Company, a Cor-

poration. Conveying $\frac{1}{3}$ interest in the "O'Neil" lode Lalande Mining District, Shoshone County, Ida. Plffs. Ex. 26. C. H. S.

Plaintiffs' Exhibit No. 27.

Power of Attorney.

Know all men by these presents: That I, Eleanor Truax O'Neil of Spokane County, in the State of Washington, have made, constituted and appointed, and by these presents do make, constitute and appoint B. D. Crocker of the County of Walla Walla, in the State of Washington, my true and lawful attorney in fact, for me and in my name, place and stead, and for my use and benefit:

First: To ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever as are now or shall hereafter become due owing, payable, or belonging to me, and have, use, and take all lawful ways and means in my name or otherwise, for the recovery thereof, by attachments, arrests, distress, or otherwise, and to compromise and agree for the same, and acquittances, or other sufficient discharges for the same for me, and in my name, to make, seal and deliver:

Second: Also, to bargain, contract, agree for, purchase, receive and take lands, tenements, hereditaments, and accept the seisin and possession of all lands, and all deeds and other assurances in the law therefor, and to lease, demise, bargain, sell, remise, release, convey,

mortgage and hypothecate lands, tenements, and hereditaments, upon such terms and conditions and under such covenants as he shall think fit, and for me and in my name, place and stead and as my act and deed to sign, seal, execute, deliver and acknowledge such deeds, leases, and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bills, bonds, notes, receipts, evidences of debt, releases and satisfactions of mortgages, judgments, and other debts and such other instruments in writing of whatsoever kind and nature as may be necessary or proper in the premises:

Third: Also, to bargain, and agree for, buy, sell, mortgage, hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, choses in action and other property in possession or in action, and to make, do and transact all and every kind of business of what nature and kind soever, and also for me and in my name and as my act and deed, to sign, seal, execute, deliver and acknowledge such covenants, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfactions of mortgages, judgments and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises, and especially to manage and control all my business connected with mines and mining interests in the State of Idaho and elsewhere.

That I give unto my said attorney full power to do everything whatsoever requisite and necessary to be done in the premises, as fully as I could if personally

present with power of substitution and revocation hereby ratifying and confirming all that my said attorney shall lawfully do, or cause to be done, by virtue hereof.

In Witness Whereof, I have hereunto set my hand and seal this the 1st day of August, A. D. 1898.

ELEANOR TRUAX O'NEIL. [Seal]

Signed, sealed, and delivered in the presence of:

SARAH E. TRUAX.

N. BUCK.

[U. S. I. R. stamp 25 cents attached.]

State of Washington, }
County of Spokane. } ss.

I, Warren W. Tolman, a Notary Public, in and for said County and State, do hereby certify that on this 1st day of August, A. D. 1898, personally appeared before me Eleanor Truax O'Neil to me known to be the individual described in and who executed the within instrument and acknowledged that she signed and sealed the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 1st day of August, A. D. 1898.

[Seal]

WARREN W. TOLMAN,

Notary Public, Residing at Spokane, Wash.

State of Idaho, }
County of Shoshone. } ss.

I hereby certify that the within instrument was filed for record and recorded in the office of the County Re

order of said County on the 4th day of August, A. D. 1898, at 9 o'clock, A. M., at the request of B. D. Crocker.

BARRY N. HILLARD,

County Recorder.

By John P. Sheehy,

Deputy.

State of Idaho, }
County of Shoshone. } ss

I, Horace M. Davenport, County Recorder in and for said County, do hereby certify that the foregoing copy of Power of Attorney has been by me compared with the original and that it is a correct transcript therefrom as the same appears of record in Book "D" of Powers of Attorney, on page 275 thereof, at my office and in my custody.

In testimony whereof, I hereunto set my hand and affix my official seal this 4th day of October, A. D. 1901.

[Seal]

HORACE M. DAVENPORT,

County Recorder.

[Endorsed]: Certified Copy. Power of Attorney, Eleanor Truax O'Neil to B. D. Crocker. Dated, August 1st, 1898. Plffs. Ex. 27. C. H. S.

Plaintiffs' Exhibit No. 28.

Spokane, Wash., Oct. 20, 1899. No. 4665.

FORSTER & WAKEFIELD.

Pay to the order of P. Clark, \$7,000.00, Seven thousand Dollars.

To Exchange National Bank, Spokane, Wash.

FORSTER & WAKEFIELD.

[Two Cents U. S. Int. Rev. Stamp. Canceled.]

[Endorsed]: Patrick Clark, P. Clark. Traders' National Bank, Spokane, Wash. Oct. 21, 1899. Paid through Clearing House.

Plaintiffs' Exhibit No. 29.

Agreement.

Burke, Idaho, Jan. 26th, 1900.

This Agreement made and entered into on this 26th day of January, 1900, between John P. O'Neil, of Shoshone County, State of Idaho; party of the first part, and the Buffalo Hump Mining Company, a corporation organized under the laws of the State of New York, party of the second part.

Witnesseth: For consideration of One Hundred (\$100.00) Dollars to the party of the first part in hand paid by the party of the second party, the receipt of which is hereby acknowledged, the said party of the first part hereby covenants and agrees to sell and convey to the party of the second part the following described lodes and mining claims, to wit:

The undivided third interest of, in and to the O'Neil lode and mining claim, being on the Tiger and Poorman lode, and being an easterly extension of the Ella Fraction lode; the Mono Fraction lode and mining claim, the said Mono Fraction being the easterly extension of the

O'Neil claim; the Russell lode and mining claim, being the easterly extension of the said Mono Fraction claim; the Shoefly No. 2 lode and mining claim, the said Shoefly No. 2 being a claim, lying north and adjoining the Tiger & Poorman mining claims, all of said properties being situated in Lalande Mining District, Shoshone County, Idaho, upon the following terms and conditions, to wit: The entire price for the O'Neil lode and mining claim being Ten Thousand (\$10,000) Dollars, of which \$100.00 has been paid, leaving \$9900.00 to be paid, the sum of \$3900.00 to be paid under this agreement on or before the first of Feb., 1900. The remaining \$6000.00 to be paid on or before the first of August, 1900. For the Mono Fraction lode and mining claim Four Thousand (\$4000.00) Dollars to be paid, of which the sum of \$1600.00 is to be paid on or before the first of Feb., 1900, and the balance of \$2400.00 to be paid on or before the first of August, 1900. For the Russell lode and mining claim Four Thousand (\$4000.00) Dollars, of which \$1600.00 is to be paid on or before the first of Feb., 1900, and the balance of \$2400.00 to be paid on or before the first day of August, 1900. And for the Shoefly No. 2 lode and mining claim Two Thousand (\$2000.00) Dollars, of which \$800.00 is to be paid on or before the First of Feb., 1900, and the balance of \$1200.00 is to be paid on or before the first of August, 1900. And as security for the performance of this contract upon the part of the party of the first part he agrees to deposit separate deeds for each of the above described properties as an escrow in the First National Bank of Wallace, Idaho,

conditioned as above stated, that at the date of his depositing such deed as an escrow in such bank the first payment, as above stated, is to be paid by the party of the second part to the credit of the party of the first part. It being understood and agreed between the parties hereto that the title to the Mono Fraction the Russell and the Shoefly No. 2 lodes and mining claims is not at this time fully vested in the said party of the first part, and the said party of the first part hereby covenants and agrees that prior to the first day of August, 1900, he will secure title to each of the above mentioned mining claims, so that the same will be perfected and enable him to make a good and sufficient conveyance, vesting title in the said party of the second part, or its successors, in each of the respective three mining claims. In case he the said party of the first part, should fail to perfect title in himself so as to be able, on the first of August, 1900, make a good and sufficient conveyance; and clear of all clouds and incumbrances, in either of the three respective mining claims, the party of the second part shall be entitled to deduct from the purchase price herein agreed upon such proportion of such purchase price as will be ratable according to the purchase price hereinbefore stated for said properties, or either of them, and that he, the said party of the first part, will accept such proportion of said purchase price as his interest in each of said respective claims shall then appear on record, and will at that time upon the payment of the proportion then appearing to be vested in him, deliver deeds for his interest in the said three

mining claims, or either of them, of which the party of the second part shall elect to consummate the purchase of his said interests.

In case the party of the second part shall fail to make said final payments, the first payment made upon the said properties shall be forfeited to the party of the first part, and he hereby agrees to accept the same in full as liquidated damages.

Shall this agreement be kept by parties of the second part, then deeds for the respective properties, or either of them, shall be delivered by the bank for the respective claims, or either of them, according to the terms of this agreement. The party of the first part binds himself in this agreement, his heirs, executors, administrators, and assigns.

In witness whereof; the party of the first part has hereunto set his hand and seal the day and year first above written.

JOHN P. O'NEIL. [Seal.]

Signed, Sealed and Delivered in presence of:

W. W. WOODS.

R. H. KINGSBURY.

Jan'y. 27, 1900.

Received of F. R. Culbertson for the Buffalo Hump Mining Company Four Hundred Dollars to apply upon the purchase price of the O'Neil lode & mining claim as specified in the above agreement. If the balance of payment is not made on said premises on or before February 1st, 1900, the said sum and previous payment of \$100.00 is to be forfeited to me.

JOHN P. O'NEIL.

State of Idaho, }
County of Shoshone. } ss.

On this 27th day of Jan'y, A. D. 1900, before me M. J. Flohr, a Notary Public in and for the said County personally appeared John P. O'Neil, personally known to me to be the same person described in and whose name is subscribed to the within instrument and who executed the same, and acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein set forth.

In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in Wallace, the day and year in this certificate first above written.

[Seal]

M. J. FLOHR,
Notary Public.

[U. S. I. R. 10c. stamp attached.]

Recorded at the request of W. W. Woods, Jan. 27, 1900, at 4 o'clock P. M.

HORACE M. DAVENPORT,
County Recorder.

State of Idaho, }
County of Shoshone. } ss.

I, Horace M. Davenport, County Recorder in and for said County, do hereby certify that the foregoing copy of Agreement has been by me compared with the original and that it is a correct transcript therefrom as the same appears of record in Book "D" of Bonds and Agreements, on page 534 thereof, at my office and in my custody.

In testimony whereof, I hereunto set my hand and affix my official seal this 11th day of October, A. D. 1901.

[Seal]

HORACE M. DAVENPORT,

County Recorder.

By John P. Sheehy,

Deputy.

[Endorsed]: (Certified Copy.) Of Agreement of John P. O'Neil, with Buffalo Hump Mining Company. Pliffs' Exhibit 29. E. J. L.

Plaintiffs' Exhibit No. 30.

Mining Deed.

This indenture, made the first day of August, A. D. 1900, between John P. O'Neil of the town of Burke, County of Shoshone, State of Idaho, the party of the first part, and Buffalo Hump Mining Company, a corporation organized and existing under and by virtue of the laws of the State of New York the party of the second part Witnesseth: That the said party of the first part, for and in consideration of the sum of Fourteen thousand eight hundred thirty-three and 33-100 (\$14,833.-33) Dollars, lawful money of the United States of America, to him in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, has Granted, Bargained, Sold, Remised, Released and forever Quit-claimed, and by these presents does Grant, Bargain, Sell, Remise, Release and forever Quit-claim unto said party of the second part, and to its successors and assigns, all of his (the said party of the first part)

right, title and interest of, in and to the following lode mining claims, situated and located in Lalande Mining District, County of Shoshone, State of Idaho, and more particularly described as follows, to wit: The "O'Neil" lode mining claim the patent for which from the United States is recorded in the office of the Recorder of the said County of Shoshone, State of Idaho, in Book "6" of Deeds at page 429, to which patent and the record thereof reference is hereby had and made for a more particular description of said "O'Neil" lode mining claim:

Also the "Shoe-fly" lode mining claim, the notice of location of which is recorded in the office of the Recorder of the County of Shoshone, State of Idaho, in Book "C" of Quartz Locations at page 69, to which said notice and the record thereof reference is hereby had and made for a more particular description of said "Shoe-fly" lode mining claim:

Also the "Shoo Fly No. 2" lode mining claim, the notice of location of which is recorded in the office of the Recorder of the County of Shoshone, State of Idaho, in Book "E" of Quartz Locations, at page 581, to which notice and the record thereof reference is hereby had and made for a more particular description of said "Shoo Fly No. 2" lode mining claim:

Also the "Mono Fraction" lode mining claim the notice of location of which is recorded in the office of the Recorder of the County of Shoshone, State of Idaho, in Book "O" of Quartz Locations, at page 229, to which notice and the record thereof reference is hereby had and

made for a more particular description of said "Mono Fraction" lode mining claim:

And also the "Russell" lode mining claim, the notice of location of which is recorded in the office of the Recorder of the County of Shoshone, State of Idaho, in Book "B" of Quartz Locations at page 338, to which notice and the record thereof reference is hereby had and made for a more particular description of said "Russell" lode mining claim.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also, all and singular the tenements, hereditaments, appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors and assigns, forever.

In witness whereof, the said party of the first part has

hereunto set his hand and seal, the day and year first above written.

JOHN P. O'NEIL. [Seal.]

Signed, Sealed and Delivered in Presence of:

C. W. BEALE.

Revenue stamp to the amount of \$15.00 on this instrument and canceled.

State of Idaho, }
County of Shoshone. } ss.

On this 1st day of August, A. D. 1900, before me, H. M. Davenport, a Notary Public in and for said County of Shoshone, State of Idaho, personally appeared John P. O'Neil, personally known to me to be the person whose name is subscribed to the within and above instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, the day and year in this certificate first above written.

[Seal]

H. M. DAVENPORT,
Notary Public.

Recorded at the request of F. R. Culbertson, August 1st, 1900, at 5 o'clock P. M., in Book 17 of Deeds, page 40, Records of Shoshone County, State of Idaho.

HORACE M. DAVENPORT,
County Recorder.

State of Idaho, }
County of Shoshone. } ss.

I, Horace M. Davenport, County Recorder in and for

said County, do hereby certify that the foregoing copy of Deed has been by me compared with the original, and that it is a correct transcript therefrom as the same appears of record in Book "17" of Deeds, on page 40 thereof, at my office and in my custody.

In testimony whereof, I hereunto set my hand and affix my official seal, this 17th day of October, A. D. 1901.

[Seal]

HORACE M. DAVENPORT,

County Recorder.

By John P. Sheehy,

Deputy.

[Endorsed]: Certified copy deed from John P. O'Neil to Buffalo Hump Mining Company. $\frac{1}{3}$ interest in the "O'Neil" lode, Lalande Mining District, Shoshone County, Idaho, together with other property. Plffs. Exhibit 30. E. J. L.

Plaintiffs' Exhibit No. 31.

CHARLES M. FASSETT,

Assay Office and Ore Testing Works.

Member American Chemical Society.

Member American Institute Mining Engineers.

Cable Address Cemfast, Postal Code.

Practical Working Tests
Of Ores by any Process.

Wilfley Table.

Spokane, Washington, Sept, 24, 1901.

Memorandum of Assay of Ore Made for P. Clark by Jas.
Harvey.

Assay Value Per Ton of 2,000 Pounds Advoirdupois.

Sample Mark.

	Lead at. .cts. per lb.	Silver at. .cts. per oz.
	Per cent. Dollars. cts.	Ounces, 10ths.
Ella No. 1.	25 3-10	13
Ella No. 2.	24 9-10	11.7
Ella No. 3.	41 1-10	21.5

No. 29262—4.

Charges, \$4.50.

All samples saved for one year. Pulps can be had from these samples for check assays, at any time.

Taken on Sept. 20th.

C. M. FASSETT.

Pliffs. Exhibit 31. E. J. L.

Plaintiffs' Exhibit No. 33.

In the Circuit Court of the United States for the District of Idaho, Northern Division.

PATRICK CLARK et al.,	}
Complainants,	
vs.	
THE BUFFALO HUMP MINING COMPANY et al.,	}
Defendants.	

Order Permitting Plaintiffs to Enter Premises.

The plaintiffs having withdrawn their application for an injunction and a receivership, by agreement of parties expressed in open court, it is ordered:

That the plaintiffs and their engineers, with necessary assistants, be allowed to enter into the premises in controversy in this suit through the workings of the defendants, to make an underground survey and examination of the premises in controversy in this suit, and that until this case has been finally tried and decided by this Court, the plaintiffs be allowed access to the premises in controversy through the workings of the defendant companies by a representative to be appointed by the plaintiffs at all reasonable times; such representative to be either one of the plaintiffs or some person unobjectionable to the defendants.

Done in open court, at Boise City, Idaho, this 14th day of September, 1901.

JAS. H. BEATTY,

Judge.

It is hereby stipulated that the foregoing order may be entered without further presentation by counsel.

STOLL & MacDONALD,

M. J. GORDON,

W. W. WOODS,

Attys. for Plffs.

W. B. HEYBURN,

Atty. for Defendants.

[Endorsed]: No. 247. United States Circuit Court, Northern Division, District of Idaho. Patrick Clark et al. vs. Buffalo Hump Mining Co. Order. Filed September 14, 1901. A. L. Richardson, Clerk.

Plaintiffs' Exhibit No. 34.

CERTIFICATE OF INCORPORATION

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States, and at least one of us a resident of the State of New York, desiring to form a stock corporation, pursuant to the provisions of The Business Corporations law of the State of New York, do hereby make, sign, acknowledge and file this certificate for that purpose, as follows, to wit:

First: The name of the proposed corporation is EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY.

Second: The purposes for which said corporation is to be formed are the buying, acquiring, leasing, developing, improving, operating and otherwise dealing in mines and mining properties in any part of the State of New York, and elsewhere in any of the States and Territories of the United States of America, to enter into contracts, under purchases, leases, or otherwise, with any person or corporation relative to such business; to acquire contracts for any of the said purposes, and to sell, pledge, mortgage, sublet or lease to others any mining property or properties so acquired by it as such corporation; to receive or give in payment or contract so to do in whole or in part, for any of the purposes of its said business, the stocks or bonds, promissory notes, obliga-

tions or securities of any character, whether of a corporation or individual, as the case may be; to hold, operate, improve, develop and use for the time being, and with the view of reselling and disposing of same, the mining properties so purchased, acquired, leased or held by it as aforesaid, to issue bonds, debentures or obligations of the Company, from time to time, for any of the objects and purposes of the Company; and secure the same by a mortgage mortgages, deed or deeds of trust, on any or all of the property, rights, franchises and income of the Company, in such manner, and upon such terms as the Stockholders or Board of Directors may deem expedient; to invest in, purchase, acquire, hold and own the stocks and debentures of other corporations with whom, in the carrying on of its said business, the said Company shall have dealings, and generally to do and transact all acts, business and things incident to, or in any way connected with, or necessary to carry out any of the purposes or objects hereinbefore generally expressed.

Third: The amount of the capital stock is seven hundred and fifty thousand dollars.

Fourth: The number of shares of which the capital stock shall consist is 75,000 shares, of the par value of Ten Dollars per share, and the amount of capital with which such corporation will begin business is J. J. C. \$375,000.

Fifth: The principal office of said corporation is to be located in the City of New York, Borough of Manhattan, in the County of New York, and State of New York.

Sixth: Its duration is to be fifty years.

Seventh: The number of its directors is to be seven.

Eighth: The names and postoffice addresses of the directors for the first year are as follows:

Names.	Postoffice Addresses.
Edwin Packard,	241 Henry Street, Brooklyn, N. Y.
George Cox, Jr.,	17 William Street, New York.
J. Edward Weld,	160 Broadway, New York.
Herbert W. Grindal,	160 Broadway, New York.
James Dunne,	31 Nassau Street, New York.
William S. Dennatt	S East 49th Street, New York.
Richard M. Hurd,	59 Cedar Street, New York.

Ninth: The names and postoffice addresses of the subscribers, and a statement of the number of shares of stock which each agrees to take in the corporation, are as follows:

Names.	Postoffice Addresses.	No. of Shares.
Edwin Packard,	241 Henry St., Brooklyn, N. Y.	15 shares.
George Cox, Jr.,	17 William Street, New York,	15 shares.
J. Edward Weld,	160 Broadway, New York,	15 shares.
Herbert W. Grindal,	160 Broadway, New York,	15 shares.
J. J. C. James Dunne,	31 Nassau Street, New York,	37,400 shares.
William S. Dennett	S East 49th Street, N. Y.,	15 shares.
Richard M. Hurd,	59 Cedar Street, New York,	15 shares.

In witness whereof, we have severally made, signed, acknowledged and filed this Certificate in duplicate.

Dated this 9th day of May, A. D., 1898.

H. V. RUTHERFORD.
GUSTAV FRIELING.
JAMES DUNNE.

State of New York, }
City and County of New York. } ss.

On this 9th day of May, 1898, before me personally came James Dunne, H. V. Rutherford, and Gustav Frieling, to me personally known to be the persons described in and who made and signed the foregoing certificate, and severally duly acknowledged to me that they had made, signed and executed the same for the use and purposes therein set forth.

[Seal]

JOHN J. CLARK,
Notary Public Kings County,
Certificate Filed in New York County.

State of New York, }
Office of the Secretary of State. } ss.

I have compared the preceding with the original Certificate of Incorporation of Empire State-Idaho Mining and Developing Company, filed and recorded in this office on the 10th day of May, 1898, and do hereby certify that same to be a correct transcript therefrom and of the whole of said original.

Witness, my hand and Seal of Office of the Secretary of State, at the City of Albany, this 16th day of June, one thousand eight hundred and ninety-eight.

[Seal]

ANDREW DAVIDSON,
Deputy Secretary of State.

[Endorsed]: No. 770. Empire State-Idaho Mining and Developing Company. Certificate of Incorporation.

Tax for privilege of organization of this Corporation \$937.50, under chapter 908, Laws of 1896. Paid State Treasurer before Filing.

State of New York, Office of Secretary of State. Filed and Recorded May 10, 1898.

ANDREW DAVIDSON,
Deputy Secretary of State.

Filed at the request of W. B. Heyburn, Jun. 27, 1898, at 9 o'clock A. M., Records of Shoshone County, State of Idaho.

BARRY N. HILLARD,
County Recorder.
By Chas. A. Ervin,
Deputy Recorder.

State of Idaho, }
County of Shoshone. } ss.

I, Horace M. Davenport, County Recorder in and for the County of Shoshone, State of Idaho, hereby certify that the foregoing copy of Certificate of Incorporation has been by me compared with the original, and that it is a full, true and correct transcript therefrom, together with all the indorsements thereon, as the same appears on file in my office and in my custody.

In testimony whereof, I hereunto set my hand and

affix my official seal at my office in Wallace, Idaho, on this 17th day of October, A. D. 1901.

[Seal]

HORACE M. DAVENPORT,

County Recorder.

By John P. Sheehy,

Deputy.

[Endorsed]: Certified Copy of Certificate of Incorporation of the Empire State-Idaho Mining and Developing Company. Plffs. Ex. 34.

Plaintiffs' Exhibit No. 35.

Mining Deed.

This Indenture, made the 17th day of January, A. D. 1901, between the Buffalo Hump Mining Company, a corporation organized and existing under the laws of the State of New York, and doing business in Shoshone County, State of Idaho, the party of the first part, and the Empire State-Idaho Mining & Developing Company, a corporation organized and existing under the laws of the State of New York, and doing business in said Shoshone County, State of Idaho, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of Two million one hundred thousand dollars, lawful money of the United States of America, to it in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said

party of the second part and to its successors and assigns the following described mining property, to wit:

1. All of that certain quartz lode mining claim, situated in the Lalande Mining District, Shoshone County, State of Idaho, known as and called the "Tiger" lode mining claim, for a more particular description, of which reference is hereby made to the record of the United States Patent therefor, duly recorded on the 23rd day of January, 1895, upon the records of said Shoshone County, in Book 9 of deeds, at page 101 thereof.

2. Also, all of that certain quartz lode mining claim, situated in said Lalande Mining District, Shoshone County, State of Idaho, known as and called the "Poorman" lode mining claim, for a more particular description of which reference is hereby made to the record of the United States patent therefor, duly recorded on the 29th day of April, 1891, upon the records of said Shoshone County, in Book "X" of Deeds, at page 54 thereof.

3. Also all that certain quartz lode mining claim, situated in the Lalande Mining District, Shoshone County, State of Idaho, known as and called the "Wide West" lode mining claim, for a more particular description of which reference is hereby made to the record of the United States patent therefor, duly recorded on the 23rd day of January, 1895, upon the records of said Shoshone County, in Book 9 of Deeds, at page 98 thereof.

4. Also, all of that certain quartz lode mining claim, situated in said Lalande Mining District, Shoshone County, State of Idaho, known as and called the "Sheridan" lode mining claim, for a more particular description of

which reference is hereby made to the record of the United States Patent therefor, duly recorded on the 26th day of August, 1899, upon the records of said Shoshone County, in Book "A" of Patents, at page _____ thereof.

5. Also, all of that certain quartz lode mining claim, situated in said Lalande Mining District, Shoshone County, State of Idaho, known as and called the "O'Neil" lode mining claim, for a more particular description of which reference is hereby made to the record of the United States patent therefor, duly recorded on the 22nd day of June, 1894, upon the records of said Shoshone County, in Book "6" of Deeds, at page 429 thereof.

6. Also, all of its right, title and interest in and to that certain quartz lode mining claim, situated in said Lalande Mining District, Shoshone County, State of Idaho, known as and called the "Ella," and sometimes the "Ella Fraction" lode mining claim, for a more particular description of which reference is hereby made to the records of the United States patent therefor, duly recorded upon the records of said Shoshone County on the 13th day of July, 1893, in Book "4" of Deeds, at page 438 thereof.

7. Also, all of its right, title and interest in and to that certain quartz lode mining claim, situated in said Lalande Mining District, Shoshone County, State of Idaho, known as and called the "Mono Fraction" and sometimes the "Mono" lode mining claim, for a more particular description of which reference is hereby made to the record of the notice of location thereof, duly recorded on

the 31st day of December, 1894, in Book "O" of Quartz Locations, at page 229 thereof.

8. Also, all of that certain quartz lode mining claim, situated in said Lalande Mining District, Shoshone County, State of Idaho, known as and called the "Protection" lode mining claim, for a more particular description of which reference is hereby made to the record of the notice of location thereof, duly recorded upon the records of said Shoshone County, on the 20th day of November, 1899, in Book "P" of Quartz Locations, at page 364 thereof.

9. Also, all of its right, title and interest in and to that certain quartz lode mining claim, situated in said Lalande Mining District, Shoshone County, State of Idaho, known as and called the "Russell" lode mining claim, for a more particular description of which reference is hereby made to the record of the notice of location thereof, duly recorded on the 4th day of February, 1895, upon the records of said Shoshone County, in Book "B" of Quartz Locations, at page 338 thereof.

10. Also, all of its right, title and interest in and to that certain quartz lode mining claim, situated in said Lalande Mining District, Shoshone County, State of Idaho, known as and called the "Shoo Fly No. 2" and sometimes the "Shoo Fly" lode mining claim, for a more particular description of which reference is hereby made to the record of the notice of location thereof, duly recorded on the 21st day of February, 1887, upon the records of said Shoshone County in Book "E" of Quartz Locations, at page 581 thereof.

11. Also, all of that certain quartz lode mining claim, situated in said Lalande Mining District, Shoshone County, State of Idaho, known as and called the "Shoo Fly Fraction" lode mining claim, for more particular description of which reference is hereby made to the record of the notice of location thereof, duly recorded on the 12th day of November, 1900, upon the record of said Shoshone County, in Book "V" of Quartz Locations, at page 319 thereof.

12. Also all of that certain quartz lode mining claim, situated in said Lalande Mining District, Shoshone County, State of Idaho, known as and called the "Sunday" lode mining claim, for a more particular description of which reference is hereby made to the record of the notice of location thereof, duly recorded on the 14th day of May, 1900, upon the records of said Shoshone County, in Book "T" of Quartz Locations, at page 308 thereof.

13. Also, all of that certain quartz lode mining claim, situated in said Lalande Mining District, Shoshone County, State of Idaho, known as and called the "Missing Link" lode mining claim, for a more particular description of which reference is hereby made to the record of the notice of location thereof, duly recorded on the 6th day of December, 1894, upon the records of said Shoshone County, in Book "O" of Quartz Locations, at page 214 thereof.

14. Also, that certain water right, located on Gorge Gulch about one-fourth of a mile from the point where Gorge Gulch empties into Canyon Creek.

15. Also, that certain water right located on the

North side of Canyon Creek, about one-third of a mile above the concentrator and used for wash water in said concentrator.

16. Also, that certain water right located on the left hand side of Canyon Creek, about one-fourth of a mile above the concentrator and carried in a flume to a point opposite said concentrator, said water being used for concentrating purposes.

17. Also, that certain water right located on Canyon Creek, on the left hand side, about $3\frac{1}{4}$ miles above the town of Burke, Idaho, and conveyed in a flume $1\frac{3}{4}$ miles long to a point opposite the Electric Power Station, belonging to the grantor herein, said water being used for electric power purposes.

18. Also, that certain water right located on Sawmill Gulch, about one mile above where said Gulch empties into Canyon Creek, said water being conveyed in a flume along the east side of Sawmill Gulch, to a point opposite the Electrical Power Station, and used for electrical power purposes.

19. Also, all its right, title, and interest in those two certain water rights taken out of Circle and Glidden Lakes, the improvements consisting of two dams, about five miles up Canyon Creek on the east side of the same, said lakes being near the summit of the dividing ridge between Canyon Creek and Mullan.

20. Also, that certain mill-site, situate about one and one-third miles above the Town of Burke, known as the electrical power station, together with the buildings, machinery and plant thereon and connected therewith.

21. Also, that certain wooden office building, known as the old Poorman office, situated about one-fourth of a mile above the grantor's concentrator.

22. Also, that certain piece of ground, lying between the overflow of the flume and the building known as the John Stack boarding house between the railroad track and the base of the hill, on which is situated a frame building known as the Ehrenberg house.

23. Also, that certain parcel of land known as the Mike Fagan lot on which is situated the boarding house of the company grantor.

24. Also, that certain lot, piece or parcel of land conveyed to the party of the first part on the 11th day of December, A. D. 1899, by W. C. Chapman, Jr., by deed duly recorded on the 23rd day of February, A. D. 1900, in Book 8 of Deeds, at page 555 thereof, records of said Shoshone County, and described as the first lot above the Buffalo Hump Mining Company's Hotel, and commonly known as the Mattie Jones lot, said lot being fifty by one hundred and fifty feet.

25. Also, all the rights, and privileges belonging to the grantor under and by virtue of a certain contract heretofore entered into between the Consolidated Tiger & Poorman Mining Company, and the Coeur d'Alene Mining & Concentrating Company, for the continuation of a 1,000 foot tunnel through the Hidden Treasure ground, and into the Union Mining claim, said Union Mining claim being the second westerly extension of the Tiger mining claim and the first westerly extension of the Hidden Treasure mining claim.

26. Also, any and all other property, real, personal and mixed, situated in said Lalande Mining District, Shoshone County, and standing upon the records of said Shoshone County, in the name of or belonging to or owned or held by the said party of the first part.

All of said property above described being situated in said Lalande Mining District, Shoshone County, State of Idaho, and for a more particular description of each of which said properties reference is hereby made to the notice of location thereof and also to the deed or deeds conveying the same to the party of the first part and its predecessors in interest, duly recorded upon the records of said Shoshone County.

It is the intention of this instrument to convey to the party of the second part any and all right, title and interest in and to any of said above described properties, to be hereafter acquired by the party of the first part from the Government of the United States, by reason of any and all patent proceedings heretofore instituted in that behalf.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant or appurtenant or therewith usually had and enjoyed; and also, all and singular the tenements, hereditaments and appurtenances thereunto belonging, and the rents, issues and profits thereof; and also, all the estate, right, title, interest, possession, claim and demand whatsoever, as well in law as in equity, and as well in possession as in expectancy,

of the said party of the first part, in and to the above granted premises; and every part and parcel thereof.

To have and to hold, all and singular the said above granted premises, with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors and assigns forever.

In Witness Whereof, the said party of the first part, by resolution of its Board of Directors, duly adopted, has hereunto caused its President and Secretary to sign its corporate name and affix its corporate seal the day and year in this indenture first above written.

BUFFALO HUMP MINING CO.

By **EDWIN PACKARD,**

President.

[Corporate Seal] Attest: **F. J. KILNER,**

Secretary.

[U. S. I. R. \$2,100.00 stamps attached.]

Signed, Sealed and Delivered in the presence of:

JOHN A. BLOOM.

THOS. GANNON.

State of New York,

County of New York.

} ss.
 }
 }
 }

On this 17th day of January, A. D. 1901, before me, John A. Bloom, a Notary Public, in and for said County and State, personally appeared Edwin Packard, known to me to be the President of the Buffalo Hump Mining

Company, the corporation that executed the within instrument and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

JOHN A. BLOOM,

Notary Public, Kings Co., Cert. filed N. Y. Co.

[U. S. I. R. 10c stamp attached.]

State of New York, }
County of New York. } ss.

I, William Sohmer, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record do hereby certify that John A. Bloom has filed in the Clerk's Office of the County of New York, a certified copy of his appointment as Notary Public for the County of Kings with his autograph signature, and was at the time of taking the proof of acknowledgment of the annexed instrument, duly authorized to take the same. And further that I am well acquainted with the handwriting of such Notary, and verily believe the signature to the said certificate of proof of acknowledgement to be genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 17 day of Jany., 1901.

WM. SOHMER,

Clerk.

[U. S. I. R. 10c. stamp attached.]

Recorded at the request of Empire State-Idaho M. & D. Co., Feb. 12, 1901, at 2 o'clock P. M.

HORACE M. DAVENPORT,
County Recorder.

By J. A. Lieuallen,
Deputy.

State of Idaho, }
County of Shoshone. } ss.

I, Horace M. Davenport, County Recorder in and for said County, do hereby certify that the foregoing copy of Deed has been by me compared with the original, and that it is a correct transcript therefrom as the same appears of record in Book "18" of Deeds, on page 436 thereof, at my office and in my custody.

In testimony whereof, I hereunto set my hand and affix my official seal this 17th day of October, A. D. 1901.

[Seal]

HORACE M. DAVENPORT,
County Recorder.

By John P. Sheehy,
Deputy.

[Endorsed]: Certified Copy deed from Buffalo Hump Mining Company, to Empire State-Idaho Mining and Developing Company. Plffs. Ex. 35. C. H. S.

Plaintiffs' Exhibit No. 37.

Opinion.

ROSS, Circuit Judge. This was a suit in equity, brought by the appellant, as complainant, to obtain a decree annulling two certain deeds made to the defend-

ants Charles Sweeny and F. Lewis Clark—one by the administrator of the estate of one David McKelvey, deceased, under an order made in a proceeding in mandamus, for an undivided one-third interest in the Skookum mine, situated in Shoshone county, Idaho; and the other by the complainant himself to the defendants Sweeny and Clark for an undivided one-eighth interest in the same mine. The complainant also, by his bill, asked for an accounting of the profits derived by the defendants from working the mine, and also sought an order appointing a receiver to take possession of and operate the property pending the litigation. The claims of the complainant in respect to the two interests rest upon distinct and independent grounds. The one-third interest belonged to David McKelvey during his life. The record before us shows that that interest was first appraised in the proceedings had in respect to the estate of McKelvey at \$3,000, and that the complainant, Hanley, and the defendants Sweeny and Clark all wanted to get it. The Chemung Mining Company is also a factor in the case. That company was incorporated under the laws of the state of Washington by the defendants Clark and Sweeny and one W. E. Goodspeed, who, it appears from the evidence in this case, was a clerk in their office at Spokane; its articles of incorporation bearing date August 5, 1896, and its capital stock being declared to be \$2,500,000, divided into 500,000 shares of the par value of \$5 each. On the 11th day of August, 1896, an agreement in writing was entered into between the complainant, Hanley, as party of the first part, and the de-

pendants Clark and Sweeny, as parties of the second part, and witnessed by W. E. Goodspeed, by which Hanley, in consideration of the sum of \$5,000, paid and to be paid in certain specified amounts and at certain specified times, undertook to sell to Clark and Sweeny an undivided one-fourth interest in those certain mining claims described as follows, to wit: "The Jersey Fraction Mining Claim, the Lily May Mining Claim, the Carriboo Mining Claim, the Good Luck Mining Claim, and the Butte Mining Claim, all situate at Wardner, Yreka mining district, Shoshone county, Idaho, and west of the Last Chance Mining Claim"; the agreement proceeding to provide as follows:

"The party of the first part also agrees that all of the titles to these properties shall be cleaned up by him, and that said properties shall then be deeded to the Chemung Mining Company, of Spokane, Washington, the owners of which shall be as follows: Chas. Sweeny, one-half interest of said company; F. Lewis Clark, one-fourth interest of said company; and Kennedy J. Hanley, one-fourth interest of said company. The parties hereto agree to set aside one-fifth of their holdings of the stock of said company, respectively, to be used for treasury purposes. The money to clean up the title of the said properties, not to exceed the sum of five thousand dollars, to be furnished by the parties of the second part in sums as required under the direction of Chas Sweeny."

The undisputed evidence in the present case is that of the 500,000 shares of the stock of the Chemung Mining Company Hanley owned 100,000 shares, Clark and

Sweeny 300,000 shares, and that 100,000 shares were held as treasury stock of the company. The Skookum was a neighboring mining claim, the interest of the McKelvey estate in which, the evidence leaves no room to doubt, Hanley, Clark, and Sweeny wanted to acquire, and wanted to get for as near nothing as possible. This is shown not only by the testimony of each of them, but by documentary and other evidence that we find in the record, a part of which will be mentioned. The order of the probate court under which the McKelvey interest in the Skookum mine was undertaken to be sold and conveyed by the administrator of the estate is referred to in the brief of appellant's counsel, and in parts of the record, as having been made December 5, 1896, although the order itself appearing in the record purports to have been made November 30, 1896. Clark and Sweeny were the principal officers of the defendant Empire State-Idaho Mining and Developing Company, of which one W. Clayton Miller was resident manager and consulting engineer. A. G. Kerns was the attorney of the Chemung Mining Company. On the 14th day of December, 1896 (but a few days after the making of the order by the probate court of Shoshone county for the sale of the McKelvey interest in the Skookum mine), Clark wrote to Miller as follows:

"I have tried for three days to get you by telephone, but have failed. After full consultation with Mr. Hanley, it seems to me, if he can buy McKelvey's claim on the Jersey for about the sum net to us, viz., \$400, that he expects to get it for, it better be done now on general

principles, and to get through with it; and if at the same time he can, by paying \$100 or so, obtain an option on one-third of the Skookum at about \$700, so much the better. It does not seem to me, however, that we better put off too long in getting the Jersey interest cleaned up. I should not want to enter into an agreement to buy the Skookum, but would be willing to pay one hundred dollars or so to get an option on the interest. If you and Mr. Hanley think best, however, to postpone the Jersey matter, I shall be satisfied to rest upon your judgment."

Following this letter in the record, but without date, is the following:

"My Dear Kerns: Mr. Clark appears to have changed his mind, and I think now the best you can do is to put Kennedy [Hanley] onto the best and quickest way for him to close for the interest at his bid. He should, at the proper time, put it in as writing. As to Skookum, find out, and let me know; but do nothing now.

"Miller."

Immediately following is this telephone message from Clark to Hanley:

"Mr. Miller telephoned, requesting that you immediately telegraph or telephone Cunningham [who was the administrator of the McKelvey estate] withdrawing your bid on the Jersey tract. By so doing Miller says we can get a reappraisalment to better advantage. Please comply. Just withdraw your bid, and give no reasons. You can telephone me at my house, 255, after 6:30 p. m."

At the time of the making of the order by the probate court of Shoshone county, authorizing the administrator of the McKelvey estate to sell its interest in the Skookum mine, that interest stood appraised at the sum of \$3,000. Hanley had bid therefor the sum of \$700. The statute of Idaho provided that no bid should be accepted which was less than 90 per cent of the appraised value of the property. No other bid appearing to have been made, the McKelvey interest in the Skookum mine was again appraised in February, 1897, and that time at \$760. The administrator of the estate again published and posted notice that he would sell the interest on May 1, 1897, and invited bids therefor. In his return to the probate court of the sale made by him, the administrator, after setting out the notices that he caused to be published and posted, stated:

“That on the 1st day of June, 1897, this administrator received an offer or bid of seven hundred dollars for the undivided one-third interest in the Skookum lode mining, situated in Yreka district, Shoshone county, state of Idaho, from the Chemung Mining Company. That being the only bid filed with me, and that being the highest and only bid for the same, I did on said day sell said real estate to the said Chemung Mining Company, the purchaser thereof, and request that said sale be confirmed; and, further, that the court fix a date and place for a hearing upon said sale.”

This return was made and filed June 15, 1897, but was not verified, as was required by the Idaho statute. On the 18th of June following, an order was made by the

probate court designating June 30, 1897, at 10 o'clock a. m. of that day, at its courtroom in the town of Murray, Shoshone county, as the time and place for the hearing of the return, at which any person interested might appear and file written objections to the confirmation of the sale. That hearing was continued to July 26, 1897, on which day Hanley and the administrator appeared in court, as also W. W. Woods, who had theretofore been the attorney for the administrator in the matter of the estate of McKelvey. Hanley's testimony is to the effect that, after the making of the \$760 appraisal, and after the publication of the notice of sale pursuant to that appraisal, he presented to the administrator a bid of \$700 for the McKelvey interest; but such a bid, if made, does not appear among the files of the estate in the probate court, and has not been produced. As a matter of fact, however, the night before the 26th day of July, 1897, Hanley gave to the administrator \$750, which he said was a raise of \$50 on his bid. The paying of this money in advance of any confirmation of the sale, and before the petition of the administrator for its confirmation to the Chemung Company had come on for hearing, is one of the many peculiar circumstances attending the attempted disposition of the McKelvey interest. Concerning what took place the next day, July 26th, when the matter of the sale came up before the probate court, there is some conflict in the testimony. The bid of the Chemung Mining Company was submitted to the administrator by A. G. Kerns, its attorney, who resided at Wallace, Idaho, and who had an office with Mr.

Woods at that place, and who requested Mr. Woods to attend the confirmation proceedings at Murray, the county seat (to which place he was going), and look after the bid of the Chemung Company. Woods' testimony is to the effect that he went into the office of the probate judge for that purpose in the forenoon of July 26th; that Cunningham, the administrator, and the probate judge, were there; that subsequently Hanley came in; "but," said the witness, "the first inquiry addressed to me was by Mr. Cunningham [the administrator], who stated that there had been a raise of \$50 upon the bid then in. And he and Judge Whalen [the probate judge] wanted my opinion as to what to do in the matter. I inquired as to whether the advance was by the same bidder, and Mr. Cunningham replied that it was the same bidder, and that he had voluntarily raised his bid \$50. I said, 'That is a rather queer proceeding,' and I took down the statutes, and called their attention to the provisions of the statute that, if a bid was not raised to the extent of ten per cent, it would not require a new publication. I said, then, in my opinion there was no objection to the administrator taking \$50 more for the benefit of the estate, if it was the same bidder, and that my advice to the probate judge would be to confirm the bid as made, and not mention that \$50; and my advice to Cunningham as administrator was to take it up on his account, for the benefit of the estate, and confirm the bid which was already in writing. That is all that I remember of that transaction, except they agreed to act upon the advice. The administrator and the probate judge both agreed up-

on that course of conduct." The witness further stated that the administrator requested him to have a deed prepared when he returned to Wallace, and he replied that he would speak to Mr. Kerns about it. As a matter of fact, the probate judge himself, on the same day, to wit, July 26, 1897, prepared an order confirming the sale to the complainant, Hanley, and he testified in this suit that when he was making out that order Hanley, Woods, and the administrator were all present, and that while doing so he asked in the presence of all three of them, "Whom will I make this out to?" and that Hanley replied, "Make it out to me; it is my own money that is paying for it"; and that Woods assented thereto. If that testimony of Hanley is true, Woods could not be a man of honor and integrity, as complainant's counsel here concedes him to be; for he attended the confirmation proceedings at the request of the attorney of the Chemung Company, and for the purpose of having the sale confirmed to it in pursuance of its theretofore accepted bid. Woods' testimony is to the effect that nothing of the kind occurred. The probate judge signed the order confirming the sale to Hanley, and the administrator thereupon executed a deed to him purporting to convey to him the one-third interest of the estate in the Skookum mine. The 26th day of July, 1897, was a day of the regular July term of the probate court of Shoshone county, section 3843 of the Revised Statutes of that state providing that:

"The terms of the probate court in the several counties for the transaction of all probate business, except that

especially authorized by law to be done in vacation, must be held on the fourth Monday in each month. For the transaction of all civil, other than probate business, and all criminal business, these courts are always open."

The next section is as follows:

"The terms of the probate court must be held at the county seats. There shall be a clerk of said court to be appointed by the judge thereof, or the probate judge may act as clerk of his own court. Every probate judge shall be responsible upon his official bond for every default or misconduct in office of his clerk."

On the 12th day of August, 1897, Kerns, who had presented the bid on behalf of the Chemung Mining Company, appeared at the office of the probate judge, and stated to him that a mistake had been made in confirming the sale to Hanley, and that the Chemung Mining Company was the party entitled to the deed; that Hanley's conduct and representations by which he had procured the confirmation and deed to himself were fraudulent. And Kerns presented to the probate judge an order reciting, among other things, that the matter of the confirmation of the sale came on regularly to be heard July 26, 1897, the administrator appearing in person and by his attorney, W. W. Woods, and "Kennedy J. Hanley appearing in person representing himself to appear on behalf of the purchaser at the administrator's sale, and the court having examined the said return and heard the testimony of witness in support thereof," and it duly appearing to the court that in pursuance of the order of sale the administrator caused the proper notice to be

posted and published, and that the sale was made to the Chemung Mining Company, and further reciting "that on the 26th day of July, 1897, an order was made by this court confirming the sale of said real estate and mining premises in one Kennedy J. Hanley, and directing said administrator to execute proper and legal conveyance thereof to said Hanley upon the same bid of \$700; and it appearing to the satisfaction of the court that such order confirming said sale in Kennedy J. Hanley was obtained by misrepresentation and fraud upon the part of said Kennedy J. Hanley in pretending to represent the said Chemung Mining Company,"—proceeded to vacate and annul such order and deed, and to confirm the sale to the Chemung Mining Company, and to direct the administrator to execute a conveyance of the McKelvey interest to that company. The probate judge at first refused to sign the order so requested by Kerns, but subsequently, being urged to do so, and, as he testifies, being threatened by Kerns with a suit if he did not, affixed his signature to the order, without any notice to Hanley, and without any proof of any kind. The order was then left with the probate judge, who, under the provisions of the Idaho statute, acted as clerk of his own court, and who subsequently advised the administrator that the order so signed was void. The administrator, upon demand made on behalf of the Chemung Mining Company, refused to execute a deed to it for the interest of the McKelvey estate in the Skookum mine, and thereupon that company applied to the district court of Shoshone county for a writ of mandamus to compel the adminis-

trator to make the conveyance directed by the order. The district court decided that it was the duty of the administrator to obey the order of August 13, 1897, and the supreme court of the state on appeal affirmed the judgment. *People v. Cunningham* (Idaho) 53 Pac. 451. The administrator having, subsequent to the decision of the district court, deposited a conveyance, as required by the statute of the state, to abide the appeal, that conveyance was, after the decision of the supreme court, delivered to the Chemung Mining Company, and was put on record in the county in which the property is situated; and its title, if any, was thereafter conveyed to the defendant Empire State-Idaho Mining & Developing Company.

In the view we take of the present case, it is not necessary to consider the legal effect of the very peculiar proceedings in the probate court, nor to determine the effect of the decisions of the state courts of Idaho in the cases growing out of them which have been brought to our attention; for we are clearly of the opinion that in respect to the McKelvey interest the complainant is not, by the facts and circumstances of the case, presented in such an attitude as that a court of equity should afford him any relief in respect to that interest. The evidence leaves no room for doubt that the intent of the complainant and of the defendants Clark and Sweeny was to acquire the group of claims of which the Skookum was one, in common ownership, although in different proportions. The three were the sole owners of the stock of the Chemung Mining Company, which company

bid \$700 for the interest of the McKelvey estate in the Skookum mine. Of that bid the administrator, of course, had actual notice, for it was made to him; and in his return to the probate court he expressly stated that under the proceedings had pursuant to the \$760 appraisal of that interest he had sold it to the Chemung Mining Company, and asked the confirmation of the sale to it; and, furthermore, the administrator, in his return, expressly stated that the bid of the Chemung Company was the only bid he had received for that interest. Hanley, like every one else dealing with the administrator in respect to that interest, is certainly chargeable with constructive notice of the matters stated in that return, and we think the circumstances of the case irresistibly lead to the conclusion that he had actual notice of the bid of the Chemung Company, and that the administrator had reported to the court his sale of the interest in question to that company; otherwise, why should he have paid to the administrator \$750 the night before the day the hearing of the administrator's petition for the confirmation of his reported sale to the Chemung Company for \$700 was to be had? Hanley claims to have himself theretofore made to the administrator a bid of \$700 for that interest, which bid, however, nowhere appears among the papers of the estate, nor was it produced in this case; and the administrator, in effect, reported to the court that no such bid had been received by him, for, as has been seen, he expressly stated in his return that the only bid he received for the property was that of the Chemung Mining Com-

pany. If it be true, as claimed by the complainant, that he had in fact bid \$700 for the McKelvey interest under and pursuant to the order of sale of November 30, 1896, and it be further true that Hanley did not, in fact, know of the bid of the Chemung Company, then, and in that event, his voluntary raise of his own bid, in the absence of any other, is "peculiar," to say the least. In that view his action has not been, and cannot be, satisfactorily explained, unless it be based upon some sort of philanthropic motive, which, under the facts and circumstances of the case, we would hardly be justified in attributing to either him or the defendants Clark and Sweeny in their efforts to acquire the McKelvey interest. If, on the other hand, it be true that Hanley did actually know of the bid of the Chemung Mining Company, and it be also true that he himself had also bid \$700 for the same interest, the statements made and assented to by Hanley and the administrator before the probate judge in the presence of Woods, when the matter of the confirmation of the sale came on for hearing on the 26th of July, 1897, cannot be explained consistently with good faith and fair dealing either on the part of Hanley or the administrator. The counsel for the appellant here concedes that Woods, who had been requested by Kerns to look after the confirmation of the sale to the Chemung Company, in pursuance of its accepted bid, did not know of any bid of Hanley, or any other party than the Chemung Company. Therefore, when told by the administrator, in the presence of Hanley and the judge, that the bid had been raised, and

when in response to his question, "By whom?" he was informed that it was by the "original bidder," he very naturally said such a proceeding was "queer." Being there in the interest of the Chemung Company, if either Hanley or the administrator had said that the \$50 raise was by Hanley, Woods would have, at least, had the opportunity of seeing that the sale made to the Chemung Company pursuant to its bid, and reported by the administrator for confirmation, was not, as in fact it purported to be, confirmed to Hanley for the similar sum of \$700. This manifest deception of the representative of the Chemung Company, coupled with the facts that the administrator had theretofore accepted the bid of that company, and so reported to the court, expressly stating at the same time that there was no other bid, and no other bid being in fact produced, supplemented by the extraordinary payment by Hanley to the administrator of the \$750 the night before the day set for the hearing of the administrator's petition for the confirmation of his previously reported sale to the Chemung Company for \$700, and the withholding of notice of such payment from the court as well as that company when the accepted bid of the company came up for consideration, discloses such deceit and fraudulent practices as preclude any and every person in any manner engaged in them from the aid of any court of equity.

But all of the fraud in the case was by no means committed by the complainant. The one-eighth interest in the Skookum mine here involved was confessedly the property of Hanley. So were 100,000 shares of the

stock of the Chemung Mining Company. In respect to that interest the court below held that Hanley dealt with the defendants Clark and Sweeny at arm's length. There is not the slightest doubt that the letters, from Hanley to O'Neil, introduced in evidence, and written a few weeks before the making of the contract of April 30, 1898, show that there was an absolute want of confidence on his part in either Clark or Sweeny, so that the court below was quite right in saying that any pretense that in the agreement to dispose of his one-eighth interest Hanley relied upon any representations of Clark and Sweeny, or either of them, was without any valid support. But that is no answer to the proposition that they fraudulently withheld from their co-owner the facts in respect to the discovery of ore in the Skookum mine, made in pursuance of work prosecuted by the company, in which he was a stockholder, and at his expense, of course, as well as theirs. That they did so withhold and conceal such facts is abundantly shown by the record, and, indeed, affirmatively appears from their own testimony. The Skookum mine was reached underground only through a tunnel that had its commencement in the ground of the Last Chance Mining Claim, of which the defendants Clark and Sweeny were the principal owners, and of which one Presley was superintendent. The underground work done in the Skookum mine was done also under the superintendency of Presley, and engaged under him was, among others, a shift boss named Kendall. Presley's testimony is to the effect that in running the diamond drill into the Skookum

ground, under the direction of Clark and Sweeny, he discovered, about April 24 or 25, 1898, a body of ore in the Skookum, into which, by the 30th day of that month, a drift had been driven about 35 or 40 feet, disclosing a body of ore of such dimensions and value as that Presley, when asked to give his estimate of the value of the Skookum mine in its condition on the 30th of April, 1898, when the contract between Hanley and Clark and Sweeny was made, answered: "Judging from the prices you would have to pay for mines similar to that, it would be in the neighborhood of two hundred and fifty or three hundred dollars. I don't know that you could get one for that price that was similar." Presley further testified that Clark and Sweeny were fully apprised of the ore discovery, but that Hanley was not, and, what is more, that Hanley was kept in ignorance of it by the express orders of Clark and Sweeny. We extract from his testimony:

"Q. By Complainant's Counsel: I will ask you if, during the month of March or April, 1898, any application was made to you by Mr. Hanley to go into that mine and examine it? A. Yes, sir. Mr. Hanley asked me if he could go through the mine. Q. Did he state any reason why he wanted to go into the mine? A. He said he had interests in the mine, and that he was entitled to go through. I told him I was instructed by Mr. Sweeny not to allow him to go into the mine. Q. State whether or not, acting under those directions, you prevented him from going. A. Yes, sir; I prevented him. Q. What did you say to him? A. I merely told him

that he could not go in the mine; that I was prohibited from allowing him to go into the mine. Q. Do you recollect whether he asked you more than once the privilege of going in? A. Yes, he did. I believe he asked just before he gave an option on his interest to Sweeny. Q. How long before? A. Well, I think it was the day before, if I remember right, or a day or two. I don't just remember. I know it was shortly before. Q. And you prohibited him from going in under the direction of Mr. Sweeny? A. Yes, sir. Q. Did you tell Mr. Hanley about what the true condition of the mine was at that time, or did you give him any information about it? A. I told him there was nothing in there to speak of. Q. I will ask you now if Mr. Sweeny instructed you or Mr. Clark not to disclose the condition of the mine to either Mr. Hanley or anybody else. A. Yes, sir; I was instructed so by Mr. Sweeny. Q. And you did not? A. No, sir; I did not. Q. Did you know anything about the negotiations between Hanley and Sweeny and Clark about the sale of his interest in the Skookum mine? A. Yes, I did. Q. Did you know anything about those negotiations either from Mr. Sweeny, or Mr. Clark, or both of them? A. I did not know personally through them, but I knew that they were making a deal. Q. That was before the deal was made, as you understood? A. Yes, sir. I knew it at the time. Q. You knew it was in contemplation? A. Yes, sir. Q. Did you have any conversation with them, or either of them, about their having made a deal with him, after it was done? A. Nothing only what Mr. Sweeny told me. Q. Mr.

Sweeny told you? A. Yes, sir. Q. About what time was it that he told you? A. Well, if I remember rightly, it was about the first of May, of 1898. Q. What did he say about his negotiations with Hanley about the deal? A. He came up from Spokane one afternoon, and in the evening about 7 or 8 o'clock he told me that he had secured an option on Kennedy Hanley's interest in the Chemung for \$20,000, and his interest in the Skookum for \$10,000. Q. Did you know what Mr. Hanley's interest was in the Chemung,—what it consisted of? A. I understood it to be a third and an eighth. Q. No; I mean in the Chemung, not in the Skookum. A. Oh! in the Chemung. I understand he had some stock, and some interest besides, in the first; but I don't know what it terminated in afterwards. Q. What interest did Mr. Sweeny say he had got in the Chemung? A. Why, he didn't state in particular what interest it was. He said he had his interest in the Chemung for \$20,000, all his interest. That is all I heard him say. Q. And what did he say about the Skookum? A. He said 'an option on his interest in the Skookum for \$10,000.'

Presley further testified that Kendall was the shift boss in charge of the work that penetrated the ore body referred to, and that about the latter part of May, 1898, he (Presley) discharged him. When asked why, Presley answered:

“Why, he came to me a short time before,—I don't remember the time—but he asked me questions in regard to the Skookum ground, and if Kennedy Hanley did not

own interests in there. I did not make him any answer. I simply laid him off the first opportunity I got.

Q. What was the reason? Why did you lay him off?

A. Well, my instructions were to not allow any one to know any more about it than possible. That was one of the reasons.

Q. Was it not, Mr. Presley, for the purpose of protecting the interests of your employers, Sweeny and Clark?

A. Yes, that was my idea of it, and that is what I tried to do right along.

Q. Did you ever admit any other person into that mine along about that time?

A. Why, I never admitted any one at my own responsibility, unless they were with Mr. Sweeny. Mr. Sweeny brought some men there with him—some that come from the East.

Q. When did he bring men there?

A. Along the first of May."

Kendall's testimony is to the effect that shortly before his discharge, and about the time the ore was struck in the Skookum mine, he told Presley that he had met Hanley on the street the evening before, and that Hanley had asked him "concerning this drift,—how far we were in, and if we had any ore, and I said I gave him no set answer. He kind of smiled, and says, 'Well, maybe he has an interest in it,' and walked off." The witness further said that he did not think that he told Presley exactly what he had replied to Hanley, and in answer to the question, "But you did not tell Hanley anything?" answered: "No, not exactly. I told him there was some ore. I did not give him any decided answer." And Kendall was discharged for the reason already stated. Clark himself says in his evidence that, when asked by

Hanley concerning the mine, he said that they "had some encouragement," but he expressly states that he omitted "details." He further admitted in his testimony that the "fairness" of contracting for Hanley's interest without telling him what he knew "was not considered" by him. Yet within a few days of the discovery of the large and valuable ore body in the mine, Clark telephoned to Hanley, requesting him to come to Spokane, and on his arrival met him at his hotel, and began negotiations which culminated in the contract of April 30, 1898. A grosser fraud upon a co-owner of the property it is difficult to conceive. Now, what was the contract of April 30, 1898? At that time the mandamus proceedings against the administrator of the McKelvey estate to compel him to execute a deed for the one-third interest of that estate in the Skookum mine to the Chemung Mining Company in pursuance of the order of the probate judge, made August 13, 1897, were still pending in the supreme court of the state of Idaho; and that interest was then still being claimed by Hanley under the deed executed to him by the administrator, and by Clark and Sweeny as the property of the Chemung Mining Company. The proposition made by Hanley to Clark and Sweeny on that day, under and pursuant to the negotiations initiated at their request, was in writing, and is in evidence. It is as follows:

"My proposition is this: I will sell my one hundred thousand (100,000) shares in the Chemung Co. (at 20 cents a share) for twenty thousand dollars (\$20,000.00). I will sell my 1-3 and 1-8 interest in the Skookum claim

at the rate of thirty thousand dollars for the whole claim.

“Spokane, April 3th, 1898.

“K. J. HANLEY.”

Hanley's testimony is to the effect that throughout the negotiations leading up to the contract he refused to sell the one-eighth interest in the Skookum mine, which he confessedly owned, without including also the McKelvey one-third interest, which was in dispute between the parties; and the defendant Clark himself seems to admit as much, although his testimony is to the effect than Hanley finally agreed otherwise. On his cross-examination Clark was asked:

“Q. Did Mr. Hanley at any time ever offer to sell you either the one-eighth or the one-third interest in the Skookum mine separately from the other interest—separately from each other? A. He did offer to sell them separately from each other. Well, that is to say—No, he never at any one time said—He never at any one time entered into negotiations about the one-eighth without having a negotiation at the same time about the one-third. Q. The negotiations always covered both of his claimed interests, you denying that he had any interest in the one-third, and he claiming that he had, and you admitting that he owned a one-eighth interest? A. I think I asked Hanley at one time to put a price on everything he owned and everything he claimed up there, and he, in general, answered that he wanted to put a price on the whole of it; but when he came down to actually agreeing upon something we agreed as I have said.”

The written proposition of Hanley, by which he offered to sell the one-third and one-eighth interests at the rate of \$30,000 for the whole claim, would, as will readily be seen, make those interests amount to something over \$12,000, and Hanley admits that in the subsequent discussion of his written proposition he receded from that to the extent of finally agreeing to take for those two interests \$10,000, and \$20,000 for his 100,000 shares in the Chemung Company. The testimony of Clark and Sweeny, on the other hand, is to the effect that the final agreement was \$20,000 for the Chemung stock, and the one-eighth interest in the Skookum mine, and \$10,000 for the McKelvey one-third interest. It is not disputed that the papers in respect to the transaction were to be, and in fact were, placed in escrow. The papers were prepared in the office of Clark and Sweeny on Saturday morning, April 30, 1898, in some haste, in order that they might be deposited in a bank before the closing hour of 12 o'clock of that day. Separate deeds were prepared for the two interests in the Skookum mine, and each was signed by Hanley in Clark and Sweeny's office. All three of them at the same time signed an indorsement upon each of two envelopes prepared by a clerk of Clark and Sweeny, and under the latter's dictation, one of which reads as follows:

“This envelope is placed in escrow with E. J. Dyer, cashier of the Exchange National Bank of Spokane, Wash., on the following terms and conditions: If Chas. Sweeny and F. Lewis Clark shall pay into said bank, for the credit of Kennedy J. Hanley, eighteen thousand dol-

lars (\$18,000.00), on or before July 1st, 1898, then this envelope, with its contents, shall be delivered to said Sweeny and Clark; otherwise, it shall be delivered to Kennedy J. Hanley.

“Dated at Spokane, Wash., this 30th day of April, A. D. 1898.”

And the other:

“This envelope is placed in escrow with E. J. Dyer, cashier of the Exchange National Bank of Spokane, Wash., on the following terms and conditions: If Chas. Sweeny and F. Lewis Clark shall pay into the said bank for the credit of Kennedy J. Hanley ten thousand (\$10,000.00) dollars on or before August 1, 1898, then this envelope, with its contents, shall be delivered to said Sweeny and Clark; otherwise, it shall be delivered to Kennedy J. Hanley.

“Dated at Spokane, Wash., this 30th day of April, A. D. 1898.”

There is no dispute in the evidence in respect to the fact that under the terms of the agreement of sale, whatever they were, Hanley was to be, and in fact was, paid \$2,000 in cash in consideration of the options; and Hanley's testimony is to the effect that after the signing of the deeds and the indorsements upon the two envelopes he placed in the envelope requiring the further payment of \$18,000 the certificate for the 100,000 shares of the stock in the Chemung Mining Company, and in the other envelope the two deeds for his interest in the Skookum mine, and that the three parties then left the office, and went to the bank, taking the papers along. At the bank

was a notary public, before whom Hanley acknowledged the execution of the deeds, and received from Clark and Sweeny a check for \$2,000. It is contended on behalf of Hanley that, while he went to the desk of one of the bank clerks to make some arrangement in respect to the check, and after the notary had returned the deeds with his certificate of acknowledgment thereon, Sweeny fraudulently put the deed for Hanley's undisputed one-eighth interest in the Skookum mine in the envelope with the certificate of stock in the Chemung Mining Company, containing the indorsement requiring the additional payment of \$18,000, and in the other envelope placed the deed covering the McKelvey one-third interest in the Skookum mine, and in that condition the envelopes were sealed, and left with Dyer in escrow. The testimony of Clark and Sweeny is to the effect that the papers were so placed, not only with the knowledge of Hanley, but that it was the distinct understanding and agreement that they should be so placed; the contract, according to their testimony, being that the \$20,000 sale and purchase, if consummated, should embrace both the Chemung stock and the one-eighth interest in the Skookum mine, and that the \$10,000 sale and purchase, if consummated, should embrace only the McKelvey one-third interest in the mine. There is no doubt that some support is added to this contention by the fact that separate deeds were executed for the one-third and one-eighth interests, while one might have been made to embrace both, and by the further fact that in one of the indorsements the time fixed for the exercise of the option was July 1, 1898, and in the other—that in fact

covering the deed for the McKelvey one-third interest— was August 1, 1898, which latter date Clark and Sweeny testify was so fixed in order to give more time for the decision by the supreme court of Idaho of the mandamus case. But it must be remembered that all of the papers were prepared by Clark and Sweeny, and that it was at their suggestion that separate deeds were executed; and, while the fixing of August 1, 1898, as the date for the taking up of the deed for the McKelvey interest was very likely for the purpose of allowing more time for the decision of the mandamus case, that fact makes but little against Hanley's contention that the envelope bearing that indorsement was also to contain the deed covering the one-eighth interest. There can be no doubt that Hanley's proposition was to sell his stock in the Chemung Company for \$20,000, and both of the interests claimed by him in the Skookum mine together for something over \$12,000. There can be doubt of that fact, for the proposition was in writing, and is in evidence. We think it quite certain, also, that throughout the negotiations preceding the final agreement Hanley insisted that the two interests, one of which he confessedly owned, and the other claimed by him, should go together, and that he would not sell to the defendant Clark and Sweeny one without selling both; for such is not only Hanley's testimony, but is practically admitted by Clark. From his written offer it appears that Hanley valued his stock in the Chemung Company at \$20,000, and both interests in the mine together at but little over \$12,000. And in the discussion that resulted in Hanley's reduc-

ing his price for those two interests to \$10,000 it does not appear that Clark or Sweeny objected to his demand of \$20,000 for the Chemung stock. Under such circumstances it does not appear to us reasonable, or at all probable, that Hanley would, as Clark and Sweeny contend he did, have finally agreed to sell the one-eighth interest in the mine, which he admittedly owned, in addition to the 100,000 shares of the stock of the Chemung Company, for \$20,000. In that view, also, \$10,000 would certainly appear to be an extraordinary and extravagant price for Hanley to demand, and Clark and Sweeny to agree conditionally to give, for the disputed one-third interest in the same mine. It appears further that on the 6th or 7th day of June, 1898, Clark and Sweeny applied to Hanley for an extension of the time within which to take up the escrows. They wanted until October 1, 1898, and agreed to pay Hanley \$2,000 therefor, to be applied on the purchase price. Hanley objected to making the extension run to October 1st, and September 20, 1898, was finally agreed upon. Clark testified that they only wanted the extension to apply to the Chemung stock and the one-eighth interest in the mine, as the supreme court of Idaho a short time before had affirmed the decision of the trial court in the mandamus case; but that Hanley insisted that it should also apply to the one-third interest therein; as he wanted "to keep on making this fight." The record shows that there was at that time a petition pending in the supreme court of Idaho for a rehearing of the mandamus case, which, however, was finally disposed of within the few days thereaf-

ter by a denial of it. This statement of Clark as to their wishes in regard to the extension sought cannot be reconciled with the statement of Hanley, which is not denied, that Sweeny applied for a further extension of time within which to take the one-third interest in September, 1898. As a matter of fact, the extension was granted in the case of each of the escrows, that on the envelope calling for the additional payment of \$18,000 in these words:

"I hereby extend the above escrow to Sept. 20th, 1898.

"Spokane, W., June 6, '98. Kennedy J. Hanley."

—And that on the envelope calling for the payment of \$10,000:

"I hereby extend the above escrow to Sept. 20th, 1898.

"Spokane, W., June 7, '98. Kennedy J. Hanley."

The \$2,000 payment in consideration of the extension was evidenced by writing as follows:

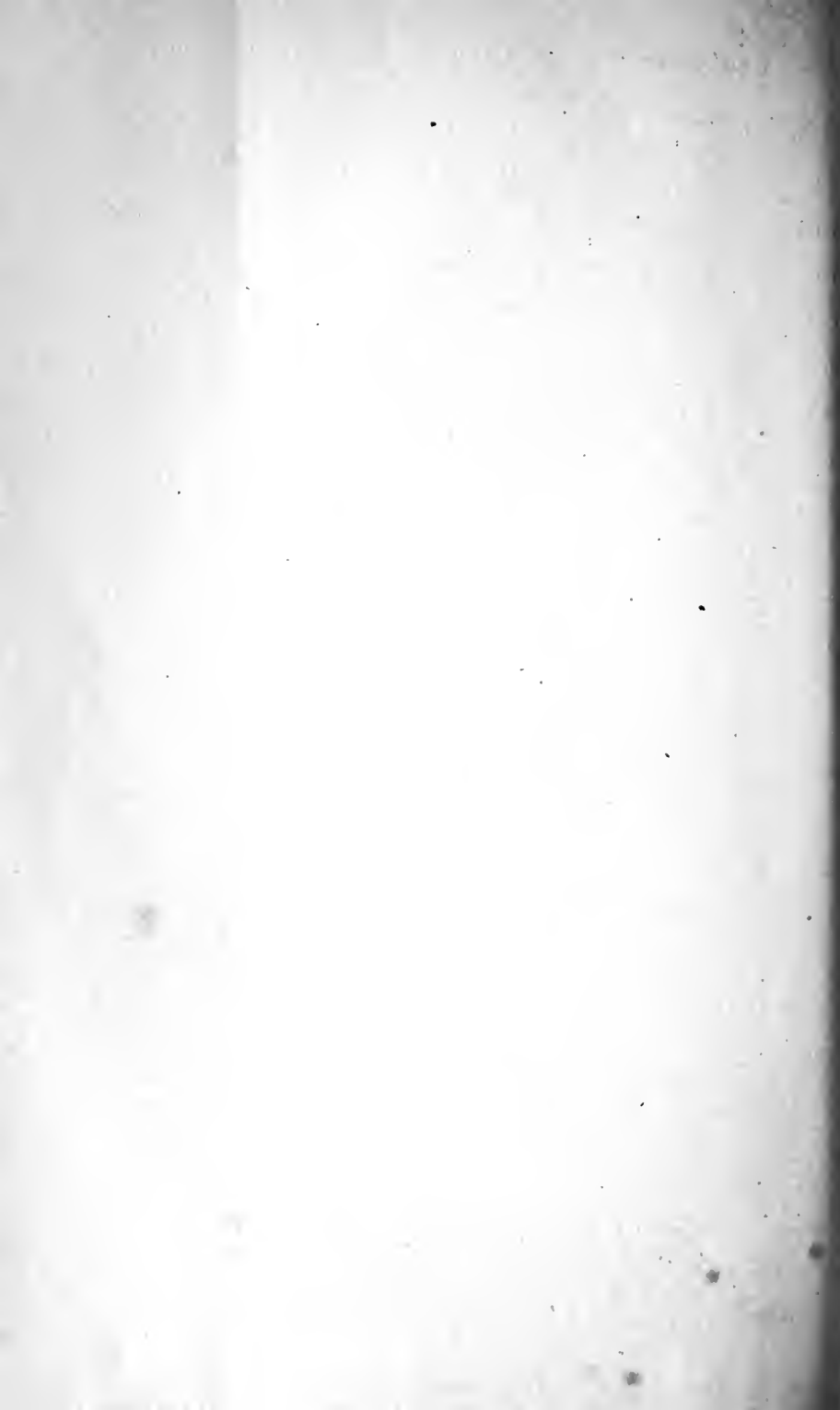
Spokane, June 7, 1898.

"E. J. Dyer, Csh.: This is to certify that Clark and Sweeny have paid \$2,000.00 on the \$18,000.00 escrow agreement due Sept. 20, 1898; so that only \$16,000.00 is due on same. Kennedy J. Hanley."

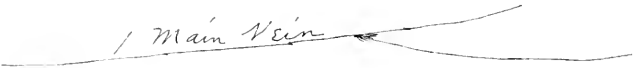
Clark testified that, as soon as the papers were left in escrow at the bank on April 30, 1898, he went back to his office, where Goodspeed, his clerk, said to him, "Give me a description exactly what those envelopes contained, so that I can keep track of them," and that he replied that "the \$18,000 envelope—the one that we were required to pay on July 1st—contained an eighth interest in the Skookum and 100,000 shares of Chemung stock,"

and that the other contained "one-third interest to the Skookum property, which was payable on August 1st," and that Goodspeed "at once sat down and prepared a copy of the two escrow agreements, and added to each copy the distinguishing statement that I made to him," which were afterwards put in their letterpress book. Clark further testified that at the time he and Hanley were talking about the June extension he called for the letterpress book, and read to Hanley therefrom a "description of the escrows, and the memorandum which described what the envelopes contained, which," added the witness, "was necessary for me to know and for Mr. Hanley to know in order to know what we were paying on when we went down to the bank." This statement of Clark is denied by Hanley, who says that the letterpress book was not shown to him in June at all, but was shown to him by Sweeny on the 17th of September, whereupon he disputed it, and went at once to the bank, and told Dyer, "I am dealing with two rascals, and I want you to watch the escrows." Although Dyer was a witness on behalf of the defendants, he was not asked anything in respect to this testimony of Hanley. While the indorsements on the envelopes did not mention their contents, the amounts specified to be paid as a condition to their delivery plainly showed the one that covered the Chemung stock, and also—if Clark and Sweeny's version of the agreement be true—the deed for the one-

eight interest in the mine. There was, therefore, no such necessity as that testified to by Clark of resorting to the memorandum that he had caused to be entered in the letterpress book of Clark and Sweeny, nor any occasion whatever to resort to anything but the indorsements on the envelopes to know which covered the Chemung stock; for the balance required to take up the contents of that envelope was there expressly declared to be \$18,000. If the agreement really was, as is contended on the part of the defendants, that that envelope should—as in fact it did—also contain the deed for the one-eighth of the Skookum mine, there would not have been the slightest occasion for Clark or Sweeny to have called Hanley's attention to any memorandum that they made in their office in respect to the matter. The fact of the making of the memorandum, and especially Clark's testimony in respect to it, we cannot but regard as suspicious. Looking at all of the facts and circumstances of the case, and carefully weighing them, we are satisfied that the truth is that the one-eighth interest in the mine was not, by the agreement of the parties, coupled with the Chemung stock; that the deed therefor was improperly placed in the envelope containing the stock; and that Clark and Sweeny received it without consideration, and in fraud of Hanley's rights. The judgment is reversed, and cause remanded to the court below for further proceedings not inconsistent with this opinion.



Plantago' Reiki' No 38.



1 Main Vein

Plat. E. Reiki 38
Ed. R.

Handwritten text at the top of the page, possibly a title or header.

Main body of handwritten text, appearing to be a list or series of entries, though the characters are highly stylized and difficult to decipher.

Handwritten signature or name at the bottom of the page.

Plaintiffs' Exhibit No. 38A.

CHARLES SWEENY.

Manager of Empire State-Idaho Mining and Developing Co., Last Chance Mining Company, Sierra Nevada Mining Co., Wardner, Idaho; Native Silver Bell Mining Company, Slocan, B. C.; Buffalo Hump Mining Co. Buffalo Hump Syndicate, Robbins Mining District, Idaho.

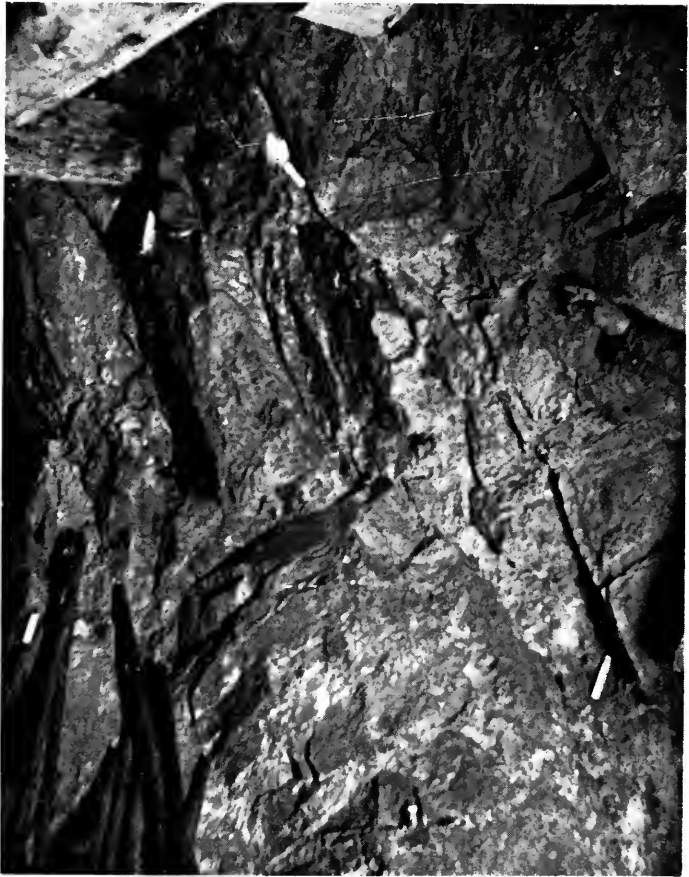
Spokane, Wash., Jan'y. 31, 1902.

Yes, I am the Charles Sweeny referred to in that decision, and I want to say here that the charges made in that case is a wanton lie and without any foundation, and that such charges could have been conceived only by persons who were capable of planning and doing those things themselves. We bought and paid for that property and only received what we bought, and have since discovered the property has no possible value except as a ranch.

[Endorsed]: Filed Mch. 6, 1902. A. L. Richardson, Clerk.

No. 870. United States Circuit Court of Appeals for the Ninth Circuit. Plaintiffs' Exhibit 38A. Received July 28, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Plaintiffs' Exhibit No. 51.



[Endorsed]: Plffs. Ex. 51, Showing S. W. Cor. of Cross-cut and Intermediate Drift 1,200 Level—Showing Fresh Face. Filed March 6, 1902. A. L. Richardson, Clerk.

No. 870. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiffs' Exhibit 51. Received July 28, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

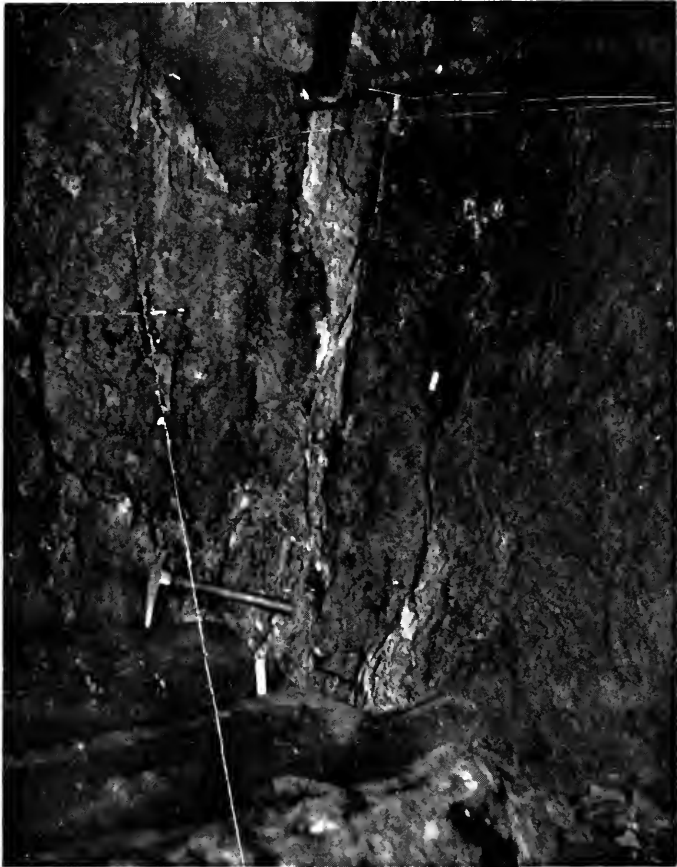
Plaintiffs' Exhibit No. 52.



[Endorsed]: Plffs. Ex. 52, Showing Width of Intermediate Drift Just East of Crosscut, 1,200 Level. Filed March 6, 1902. A. L. Richardson, Clerk.

No. 870. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiffs' Exhibit 52. Received July 28, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Plaintiffs' Exhibit No. 53.



[Endorsed]: Plffs. Ex. 53, West Face, East Drift, 1,200
—in Ella Ld. Filed March 6, 1902. A. L. Richardson,
Clerk.

No. 870. U. S. Circuit Court of Appeals for the Ninth
Circuit. Plaintiffs' Exhibit 53. Received July 28, 1902.
F. D. Monckton, Clerk. By Meredith Sawyer, Deputy
Clerk.

Defendants' Exhibit No. 1.

Spokane, Wash., Oct. 20, 1899.

No. 152.

THE EXCHANGE NATIONAL BANK,

\$7,000.00

Pay to Forster & Wakefield or order Seven Thousand
& 00-100 Dollars.

BUFFALO HUMP MINING CO.,

By F. LEWIS CLARK,

Treasurer.

General Acct.

Washington.

[Two Cents U. S. Int. Rev. Stamp.]

[Stamped]: Exchange National Bank. Paid Oct. 21,
1899. Spokane, Wash.

[Endorsed]: Forster & Wakefield.

Defendants' Exhibit No. 1.

Spokane, Wash., November 27, 1899.

No. 78.

THE EXCHANGE NATIONAL BANK,

\$1,000.00

Pay to F. R. Culbertson or order One Thousand Dollars.

BUFFALO HUMP MINING CO.,

By F. LEWIS CLARK,

Treasurer.

Tiger & Poorman Acct.

Washington.

[Stamped]: Exchange National Bank. Paid Dec. 29,
1899. Spokane, Wash.

[Two Cents U. S. Int. Rev. Stamp.]

[Stamped]: Pay Exchange Nat'l Bank, Spokane,
Wash., or order. The First Nat'l Bank of Wallace,
Wallace, Idaho.

[Endorsed]: For deposit in First Nat. Bank, Wallace,
Ida. F. R. Culbertson.

Filed Mch. 6, 1902. A. L. Richardson, Clerk.

Burke, Idaho, Nov. 24th, 1899.

F. R. Culbertson, in Account with Buffalo Hump Mining
Co., Operating Tiger & Poorman Mine.

For deed to one-fifth (1-5th) interest Ella and Miss-
ing Link Fraction Lode Claims in La Landa
Mining District, Shoshone Co., Ida.....\$1000

Certified correct:

Approved for payment:

ALLEN L. DUKEMAN.

Received the sum of One Thousand & 00-100 Dollars,
in full payment of above account.

F. R. CULBERTSON.

11-27-1899.

[Endorsed]: Deft. Ex. 1. Buffalo Hump Mining Co.,
operating Tiger & Poorman Mine. Account of F. R.
Culbertson. Amount \$1,000.00. Check No. 78. Voucher
No. 100. Date paid, 11-27-99.

No 870. United States Circuit Court of Appeals for
the Ninth Circuit. Defendants' Exhibit 1. Received
July 28, 1902. F. D. Monckton, Clerk. By Meredith
Sawyer, Deputy Clerk.

Filed Mch. 6, 1902. A. L. Richardson, Clerk.



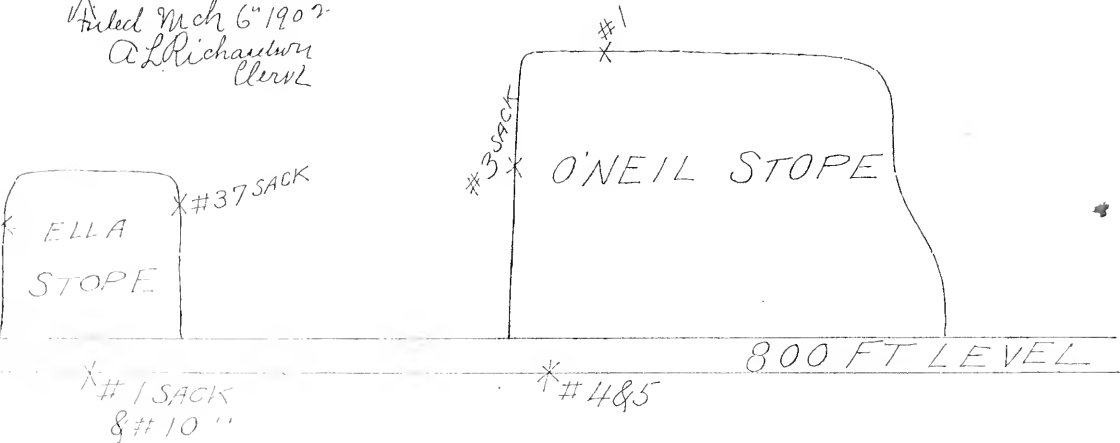
2
No 870
U S CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEFENDANTS EXHIBIT 10

Received JULY 28, 1902

F D MONCKTON, Clerk
By MEREDITH SAWYER, Deputy Clerk.

Filed Mch 6th 1902
A L Richardson
Clerk



Def's Ex 10

U.S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

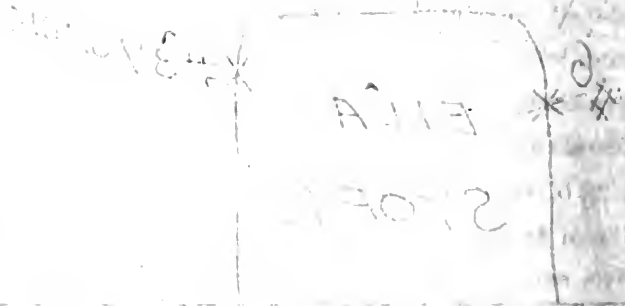
№ 870

DEFENDANT'S EXHIBIT 10

Received July 28, 1902

F.D. MONTGOMERY Clerk
BY MERRITT S. VAN DYKE

*Attended by Mr. [unclear] & Mr. [unclear]
C. L. Richardson
[unclear]*



Defendants' Exhibit No. 11.

August 25th, 1899.

Patrick Clark, Esqr., Spokane, Wash.

My Dear Sir: At the time of the consolidation of the Tiger & Poorman it was understood that I was to have a 1-5 interest in the Ella & Missing Link Fractions and I have deeds from you—Kingsbury & Harvey for a 1-20 from each but I am unable to find a deed from Jim for a 1-20 from him. I have looked through my papers but am unable to locate the deed from Jim altho I am under the impression that he sent it. "If so," it was not placed on record. I find by reference to my letter book and letters from you that your deeds were sent from Spokane, and you wrote me at the time that Jim was in Rossland, B. C. and to send deed to him there for the 1-20 interest from him and he would sign and return, and I find by my letter-book that this deed for his signature was sent to him at Rossland. As there was some delay in this the papers got separated and I did not discover until to-day that I did not have Jim's deed with the others. While I may have it somewhere among my papers but have not been able to find it to-day and as it has not been put on record I concluded to make a new deed for Jim to sign. I send it to you, as you are familiar with all the circumstances, and would like you to ask Jim to sign same and send to me.

If he consents to this you can have Mr. Eltinge take his acknowledgment and insert Mrs. Clark's first name.

You know that I have been paying 1-5 of the taxes on the property for several years. I also have your letter of Jany. 31st, 1896, saying you had spoken to all the parties interested and that it was satisfactory with them and for me to make out the deeds and send to each party, which was done. From this there should be no question about getting this 1-20 interest from Jim if you will explain the matter to him, and as to why I am sending you the deed for him to sign.

I would say that I think we can sell this property to Sweeny, and I have suggested to Mr. Sweeny that as you represented the controlling interest that he see you about price and as to about what was taken out of it.

My talk with Sweeny led me to look up my papers in the matter and this how I discovered the 1-20 interest or deed from Jim to me short. Sweeny would also, I think, be willing to take your interest in the Sheridan at a reasonable price.

You know that we have some agreements out for deeds to surface rights to property holders on the Sheridan that we the Tiger & Poorman and yourself or rather me acting for you under power of attorney have given these town property holders an agreement for deed when we got patent to Sheridan in consideration of their not adversing application for patent, and this should be carried out as agreed upon.

I think it would be well to have this attended to at once as the parties interested look to you and I to see that this carried out.

With regards,

Very truly yours etc.,

F. R. CULBERTSON.

[Endorsed]: Filed Mch. 6, 1902. A. L. Richardson, Clerk.

No. 870. United States Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit 11. Received July 28, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Defendants' Exhibit No. 12.

REPUBLIC CONSOLIDATED GOLD MINING CO.

Spokane, Washington, Sept. 7, 1899.

F. R. Culbertson, Esq., Burke, Idaho.

Dear Sir: Enclosed herewith please find deed from James Clark and wife to yourself for 1-20 interest in the Ella Fraction and Missing Link lodes, all of which I hope you will find correct.

Yours truly,

CHAS. S. ELTINGE.

What is P. T. stock worth under the new management?

[Endorsed]: 9-9-99. Defts. Ex. 12. Filed March 6, 1902. A. L. Richardson, Clerk.

No. 870. United States Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit 12. Received July 28, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Defendants' Exhibit No. 13.

Chas. S. Eltinge, Esqr., Spokane, Wash.

D Sir: I beg to acknowledge yours 7th enclosing deed from Jas. Clark & wife for 1-20 interest in Ella Fraction.

Please express my thanks to Jim for the deed and also to Patsey for his attention to the matter.

T. & P. stock I understand is selling for 25c. share.

Very truly yours,
F. R. CULBERTSON.

[Endorsed]: Defts. Ex. 13. Filed Mch. 6, 1902. A. L. Richardson, Clerk.

No. 870. United States Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit 13. Received July 28, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Defendants' Exhibit No. 19.

Mining Deed.

This Indenture, made this 25th day of August, A. D.: 1899, Between Jas. Clark and Charlotte Clark, his wife,

of the County of Spokane and State of Washington, parties of the first part, and F. R. Culbertson, of the County of Shoshone, and State of Idaho, party of the second part,

Witnesseth, That the said parties of the first part, for and in consideration of the sum of One (\$1.00) Dollars, Gold Coin of the United States, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath Granted, Bargained Sold, Remised, Released, and forever Quit-Claimed, and by these presents, does Grant, Bargain, Sell, Remise, Release, and forever Quit-claim, unto the said party of the second part, his heirs and assigns, the undivided one-twentieth (1-20) interest in the Ella Fraction and Missing Link Fraction Lode Quartz claims, as located, surveyed, recorded and held by said party of the first part, situated at Burke, Idaho,

[This deed is executed and delivered in lieu of a former deed between the same parties and for the same interest in said claims which said deed has been lost or destroyed.]

La Landa Mining District, Shoshone County, State of Idaho, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the rents, issues and profits thereof; and also all the

estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to, the said premises, and every part and parcel thereof, with the appurtenances.

To Have and to Hold, All and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

In Testimony Whereof, The said parties of the first part have hereunto set their hand and seal the day and year first above written.

JAMES CLARK. [Seal]

CHARLOTTE CLARK. [Seal]

Signed, Sealed and delivered in the presence of:

CHAS. S. ELTINGE.

[Fifty Cents U. S. Int. Rev. Stamp. Canceled.]

State of Washington, }
 County of Spokane. }^{ss.}

I, Chas. S. Eltinge, a Notary Public in and for said County and State, do hereby certify that on this 7th day of September, A. D. 1899, personally appeared before me, James Clark and Charlotte Clark, his wife, to me known to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

Given under my hand and official seal, this 7th day of September, A. D. 1899.

[Seal]

CHAS. S. ELTINGE,

Notary Public in and for said County and State, Residing at Spokane, Wash.

[Ten Cents U. S. Int. Rev. Stamp. Canceled.]

[Endorsed]: No. 1591. Mining Deed. James Clark and Charlotte Clark, his wife, to F. R. Culbertson.

State of Idaho, }
County of Shoshone. } ss.

I hereby certify that the within instrument was filed for record in the office of the County Recorder of said County, on the 9th day of September, A. D. 1899, at 2 o'clock P. M. at the request of F. R. Culbertson and recorded on page 532 of Book "14" of Deeds.

HORACE M. DAVENPORT,

County Recorder.

By John P. Sheehy,

Deputy.

Filed March 6, 1902. A. L. Richardson, Clerk.

No. 870. United States Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit 19. Received July 28, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Defendants' Exhibit No. 20.**Mining Deed.**

This Indenture, Made this 11th day of February, A. D., 1896, Between James Harvey of Burke, of the County of Shoshone and State of Idaho, party of the first part, and F. R. Culbertson of the County of Shoshone and State of Idaho, party of the second part,

Witnesseth, That the said party of the first part, for and in consideration of the sum of One & 00-100 Dollars, Gold Coin of the United States, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath Granted, Bargained, Sold, Remised, Released, and forever Quit-Claimed, and, by these presents does Grant, Bargain, Sell, Remise, Release, and forever Quit-Claim unto the said party of the second part, his heirs and assigns, the undivided one-twentieth (1-20) interest in the Ella Fraction and Missing Link Fraction as located, surveyed, recorded and held by said party of the first part, situated at Burke, in the La Landa Mining District, Shoshone County, State of Idaho, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendent and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate, right title, inter-

est, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to, the said premises, and every part and parcel thereof with the appurtenances.

To Have and to Hold, All and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part. his heirs and assigns forever.

In Testimony Whereof, The said party of the first part has hereunto set his hand and seal the day and year first above written.

JAMES P. HARVEY. [Seal]

Signed, Sealed and delivered in the presence of:

State of Idaho, }
County of Shoshone. } ss.

I, H. M. Davenport, a Notary Public in and for said County and State, do hereby certify that on this 24th day of February, A. D. 1896, personally appeared before me James P. Harvey, to me known to be the individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal, this 24th day of February, A. D., 1896.

[Seal]

H. M. DAVENPORT,
Notary Public.

[Endorsed]: No. 1458. Mining Deed. James P. Harvey to F. R. Culbertson.

County of Shoshone, }
 State of Idaho. } ss.

I hereby certify that the within instrument was filed for record in the office of the County Recorder of said County, on the 26th day of August, A. D. 1899, at 9 o'clock A. M., at the request of F. R. Culbertson, and recorded on page 494 of Book "14" of Deeds.

HORACE M. DAVENPORT,

County Recorder.

By John P. Sheehy,

Deputy.

Filed March 6, 1902. A. L. Richardson, Clerk.

No. 870. United States Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit 20. Received July 28, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Defendants' Exhibit No. 21.

Mining Deed.

This Indenture, Made this 6th day of February, A. D. 1896, Between Patrick Clark and his wife, Mary R. Clark, of the County of Spokane and State of Washington, parties of the first part, and F. R. Culbertson, of the County of Shoshone and State of Idaho, party of the second part,

Witnesseth, That the said part is of the first part, for and in consideration of the sum of One Dollars, Gold

Coin of the United States, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath Granted, Bargained, Sold, Remised, Released, and forever Quit-Claimed, and, by these presents, does Grant, Bargain, Sell, Remise, Release, and forever Quit-Claim, unto the said party of the second part, his heirs and assigns, the undivided one-twentieth (1-20) interest in the Ella Fraction, and the undivided one-twentieth (1-20) interest in the Missing Link Claim, as located, surveyed, recorded and held by said parties of the first part, situated at Burke, in the La Landa Mining District, Shoshone County, State of Idaho, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to, the said premises, and every part and parcel thereof, with the appurtenances.

To Have and to Hold, All and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

In Testimony Whereof, The said parties of the first part have hereunto set their hand and seal the day and year first above written.

PATRICK CLARK. [Seal]

MARY R. CLARK. [Seal]

Signed, Sealed and delivered in the presence of:

F. E. LUCAS.

State of Washington, }
County of Spokane. } ss.

I, W. M. Shaw, a Notary Public in and for said County and State, do hereby certify that this seventh day of March, A. D., 1896 personally appeared before me Patrick Clark and his wife Mary R. Clark to me known to be the individuals described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal, this 7th day of March, A. D., 1896.

[Seal]

W. M. SHAW,

Notary Public, residing at Spokane, Wash.

[Endorsed]: No. 1457. Mining Deed. Patrick Clark and Mary R. Clark, his wife, to F. R. Culbertson.

State of Idaho, }
County of Shoshone. } ss.

I hereby certify that the within instrument was filed for record in the office of the County Recorder of said County, on the 26th day of August, A. D., 1899, at 9

o'clock A. M., at the request of F. R. Culbertson and recorded on page 493 of book "14" of Deeds.

HORACE M. DAVENPORT,
County Recorder.
By John P. Sheehy,
Deputy.

Filed March 6, 1902, A. L. Richardson, Clerk.

No. 870. United States Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit 21. Received July 28, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Defendants' Exhibit No. 22.

Mining Deed.

This Indenture, Made this 6th day of February, A. D., 1896, Between B. C. Kingsbury of the County of Spokane and State of Idaho, party of the first part, and F. R. Culbertson of the County of Shoshone and State of Idaho, party of the second part,

Witnesseth, That the said party of the first part, for and in consideration of the sum of one dollar, Gold Coin of the United States, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath Granted, Bargained, Sold, Remised, Released, and forever Quit-Claimed, and, by these presents, does Grant, Bargain, Sell, Remise, Release, and forever Quit-Claim, unto the said party of the second part, his heirs and assigns, the undivided one-twentieth

(1-20) interest in the Ella Fraction, and the undivided one-twentieth (1-20) interest in the Missing Link Claim, as located, surveyed, recorded and held by said party of the first part, situated at Burke, in the La Landa Mining District, Shoshone County, State of Idaho, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to, the said premises, and every part and parcel thereof, with the appurtenances.

To Have and to Hold, All and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

In Testimony Whereof, The said party of the first part has hereunto set his hand and seal the day and year first above written.

BENJAMIN C. KINGSBURY. [Seal]

Signed, Sealed and delivered in the presence of:

F. E. LUCAS.

State of Washington, }
County of Spokane. } ss.

I, W. M. Shaw, a Notary Public in and for said County and State, do hereby certify that on this seventh day of March, A. D., 1896, personally appeared before me Benjamin C. Kingsbury to me known to be the individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal, this 7th day of March, A. D., 1896.

[Seal]

W. M. SHAW.

Notary Public, Residing at Spokane, Wash.

[Endorsed]: E.—6. Mining Deed. Benjamin C. Kingsbury to F. R. Culbertson.

State of Idaho, }
County of Shoshone. } ss.

I hereby certify that the within instrument was filed for record in the office of the County Recorder of said County, on the 26th day of August, A. D., 1899, at 9

o'clock A. M., at the request of F. R. Culbertson and recorded on page 496 of Book "14" of Deeds.

HORACE M. DAVENPORT,

County Recorder.

By John P. Sheehy,

Deputy.

Filed March 6, 1902. A. L. Richardson, Clerk.

No. 870. United States Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit 22. Received July 28, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

LONGITUDINAL SECTION

SHOWING RELATIVE SIZE CLARK & O'NEIL STOPES.

SCALE 40 FT = 1 INCH

Refs 4 P. 2

Refs 4 49

№ 870

U S CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLAINTIFFS EXH B 7-23

Received JULY 29 1909
F D MOUNTAIN, CLERK
By MEREDITH SAWYER
Clerk's Clerk

CLARK
STOPE

O'NEIL
STOPE

800 LEVEL

FORBMAN

ELLA GROUND

O'NEIL

1100 LEVEL

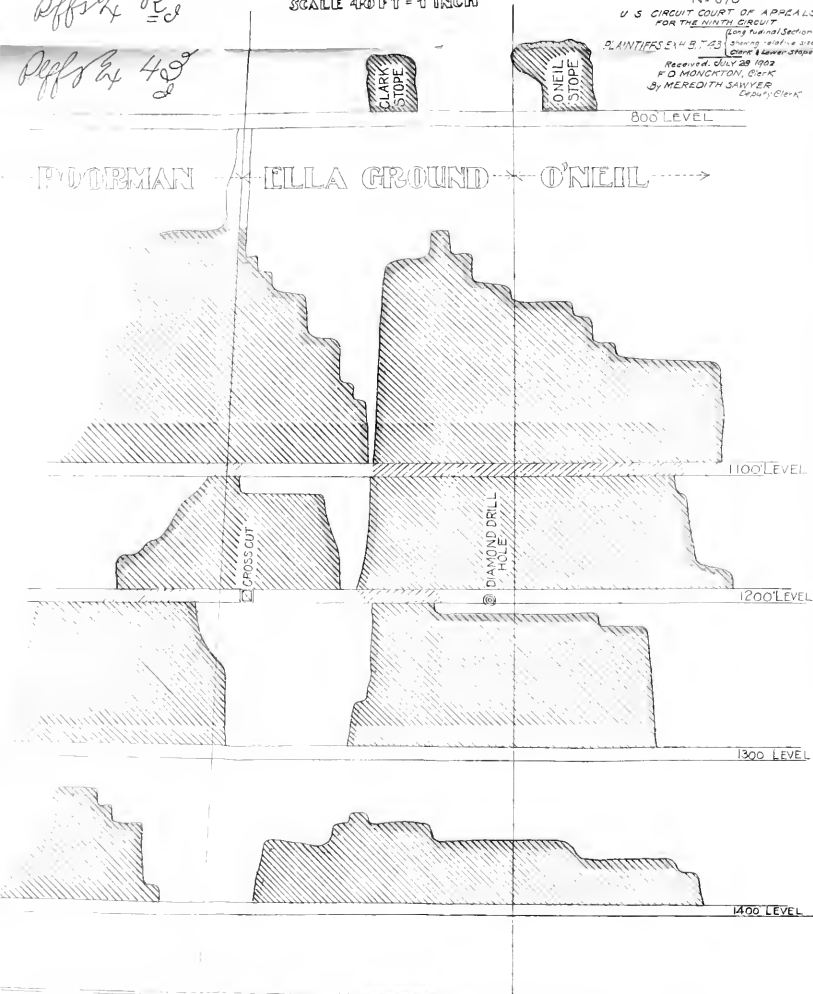
CROSS CUT

DIAMOND DRILL
HOLE

1200 LEVEL

1300 LEVEL

1400 LEVEL



o'clock A. M., at the request of F. R. Culbertson
recorded on page 100

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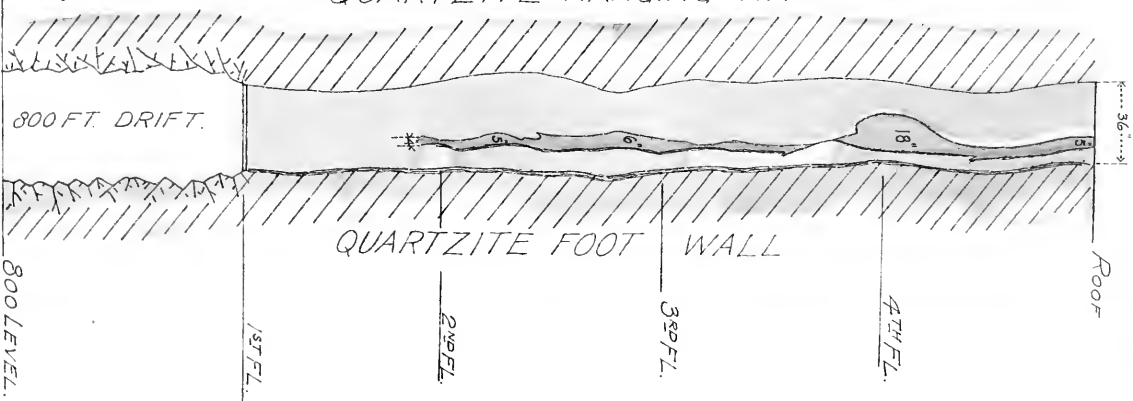
LEGEND

- COUNTRY ROCK 
- VEIN FILLING-WASTE 
- QUARTZ & ORE 

WEST FACE OF
CLARK STOPE.
SCALE 4 FT. TO THE INCH.

QUARTZITE HANGING WALL

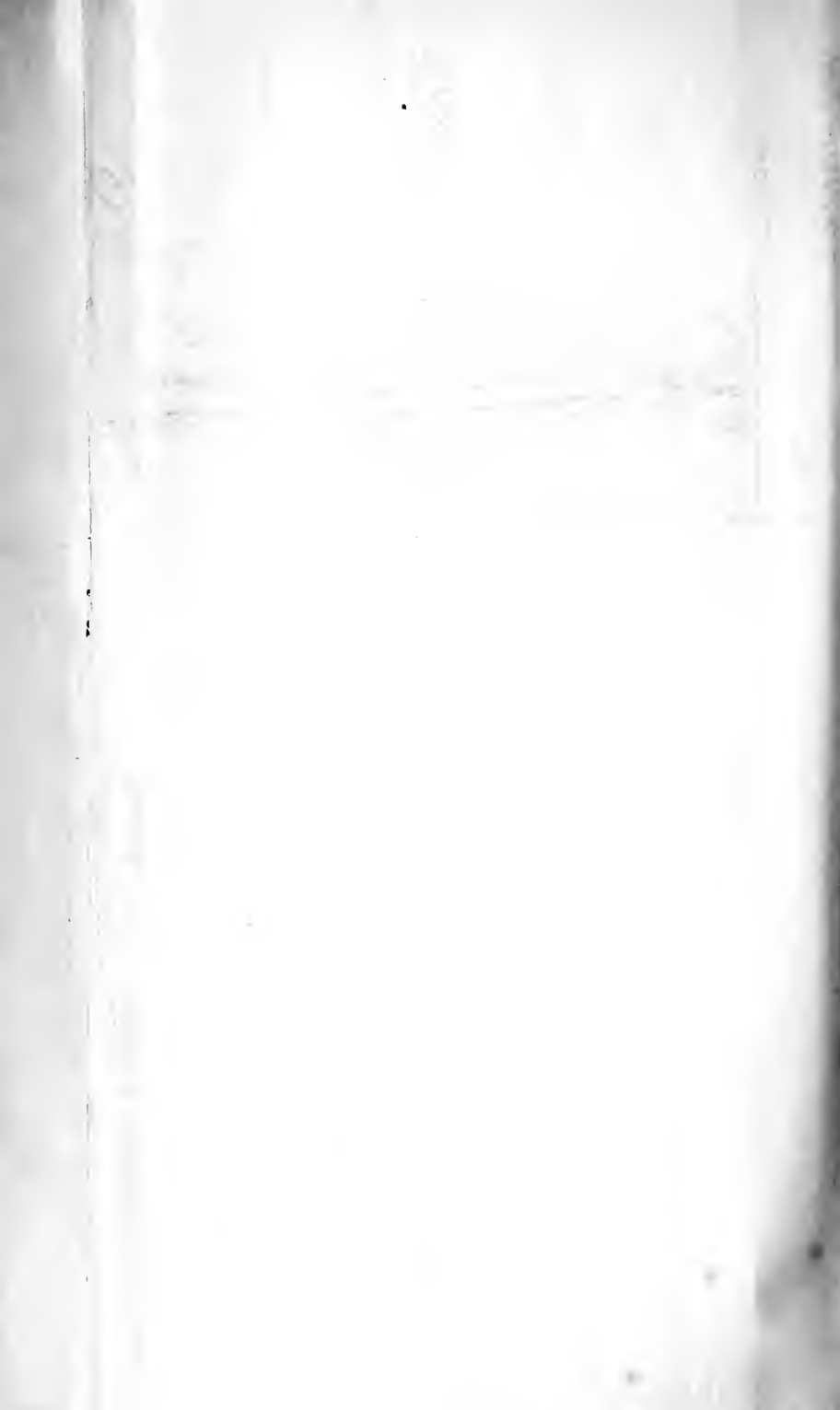
QUARTZITE FOOT WALL



No 870.

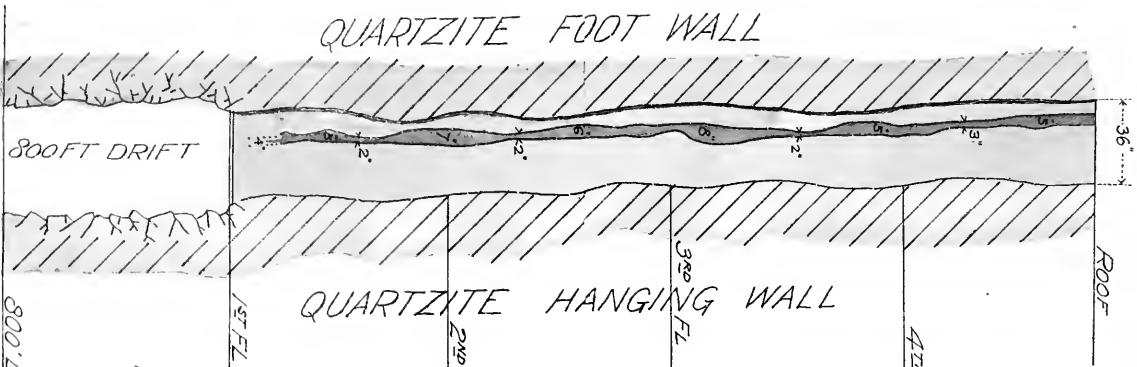
U. S. CIRCUIT COURT OF APPEALS,
FOR THE NINTH CIRCUIT.
PLAINTIFFS EXHIBIT, West face of Clark Stope
Received, JULY 28 1902.
F. D. MONCKTON, Clerk.
By MEREDITH SAWYER, Deputy Clerk.

Handwritten signatures and initials:
Meredith Sawyer
F. D. Monckton



NORTH

SOUTH



QUARTZITE FOOT WALL

800 FT DRIFT

QUARTZITE HANGING WALL

ROOF

4TH FLOOR

3RD FL

2ND FL.

1ST FL.

800 LEVEL

- LEGEND
- COUNTRY ROCK [white box]
 - VEIN FILLING - WASTE [light gray box]
 - QUARTZITE ORE [dark gray box]

EAST FACE OF
CLARK STOPE

SCALE 4 FT TO THE INCH

NO 870.

U.S. CIRCUIT COURT OF APPEALS.

FOR THE NINTH CIRCUIT.

PLAINTIFFS EXHIBIT #6 East Face of Clark Stope

Received, JULY 28, 1902

F. D. MONCKTON, Clerk

By MEREDITH SAWYER, Deputy Clerk.

Meredith Sawyer

686 BURKE

722 O'NEIL

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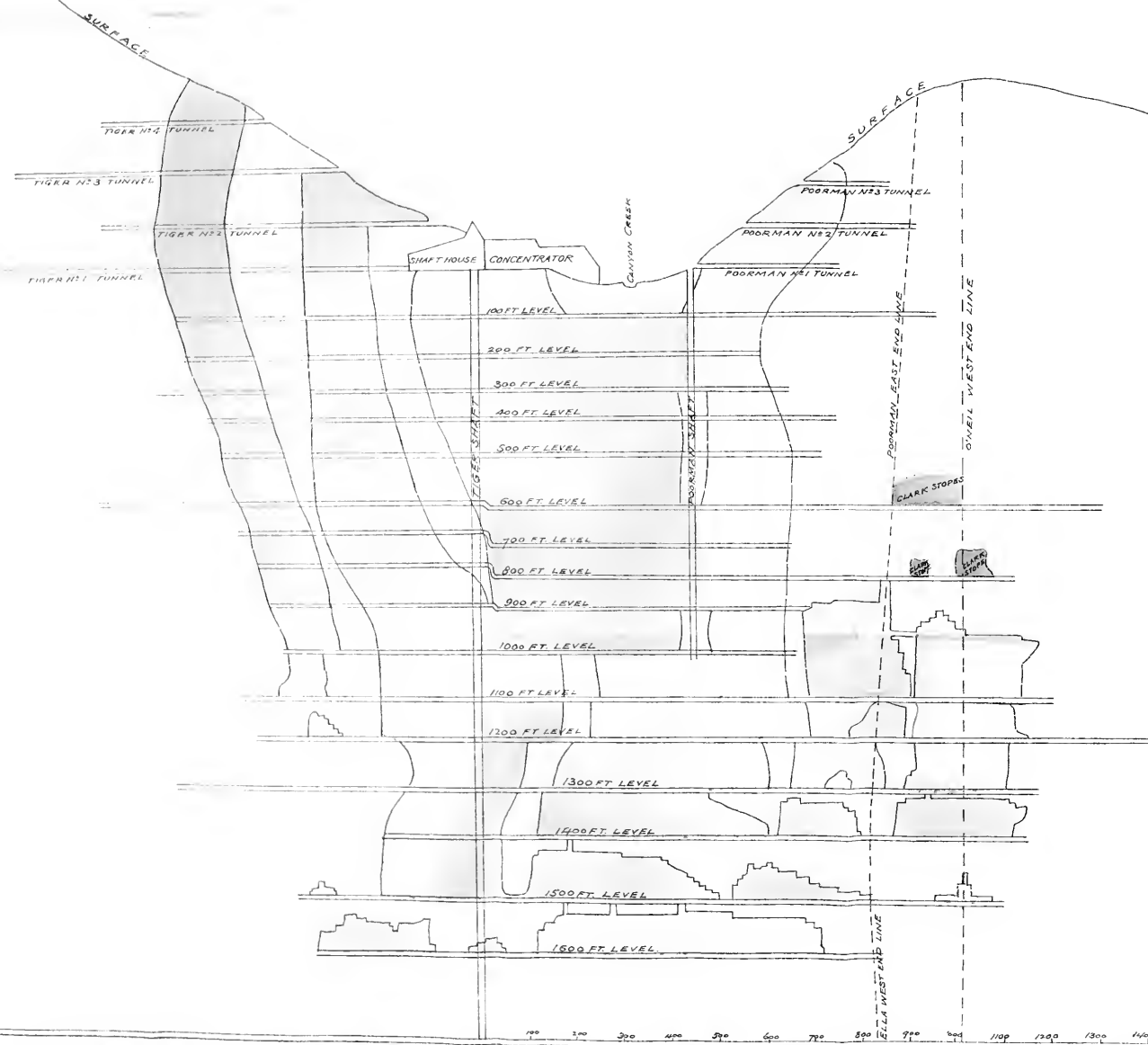
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ELLER

VINEYARD

Handwritten signature

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 § NO 870
 U S CIRCUIT COURT OF APPEALS -
 FOR THE NINTH CIRCUIT
 Federal Department of Agriculture -
 DEFENDANT'S EXHIBIT 3
 RECEIVED MAY 28 1972
 U S DISTRICT COURT
 BY MEREDITH SAWYER
 Deputy Clerk

Left of 620



No 870
 U.S. CIRCUIT COURT OF APPEALS -
 FOR THE NINTH CIRCUIT
 DEFENDANTS EXHIBIT 6 (Vertical Longitudinal
 Section of the Tiger-Poorman
 Mine. Scale 100 ft. to 1 in.)
 Received JULY 28, 1902
 F. D. MONCKTON, Clerk.
 By MEREDITH SAWYER,
 Deputy Clerk

EXHIBIT
 VERTICAL LONGITUDINAL SECTION
 OF THE
 TIGER-POORMAN MINE
 Scale 100 ft. = 1 in.
 (Reduced to 200 ft. = 1 in.)
 LOOKING NORTH-EAST
 U.S.G. 1902

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NEW YORK
NEW YORK



— PLAN & CROSS SECTIONS —

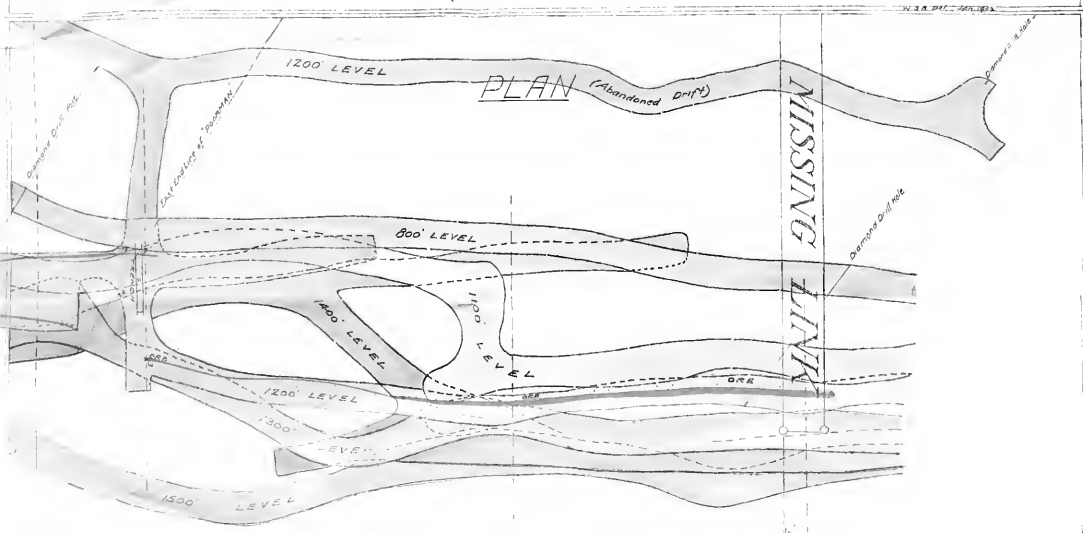
OF
— THE LOWER LEVELS —

OF
The Tiger-Poorman Mine

— THROUGH 'ELLA' GROUND —

SCALE 10 FEET TO 1 INCH
(Reduced to 20 feet to 1 inch)

Def. to 5/14/02



ELLA



W. S. P. H. W. S. P. H. W. S. P. H.

100

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RECEIVED BY THE
LIBRARY OF THE
MUSEUM OF NATURAL HISTORY
AT THE
BRITISH MUSEUM
ON THE
17th DAY OF
MAY 1902

BRITISH MUSEUM

SECTION

LOOKING EASTERLY



NEW YORK AND WASHINGTON
MAY 18 1864



NEW BIRTHING MATS

1881

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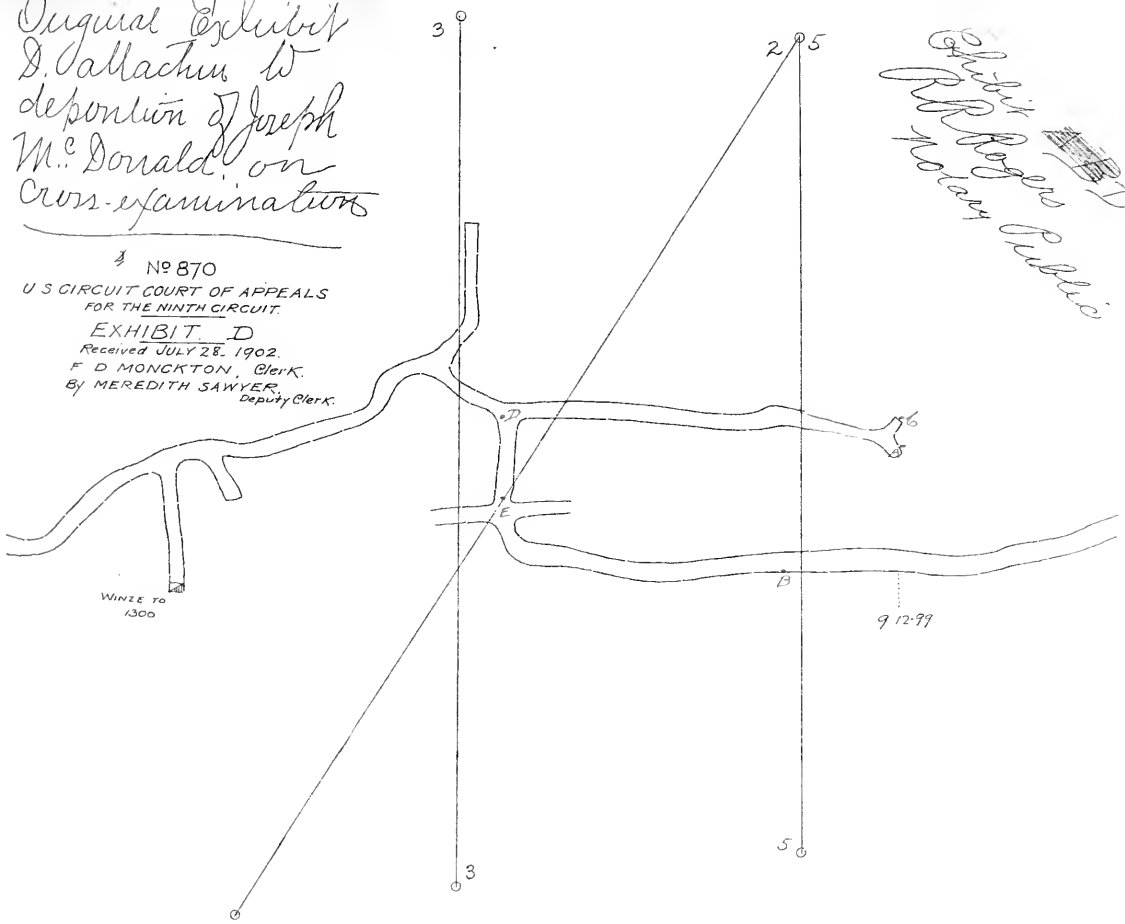
Handwritten notes or initials.

1881

Original Exhibit
D. Callahan vs
deposition of Joseph
M. Donald on
Cross-examination

№ 870
U S CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.
EXHIBIT D
Received JULY 28. 1902.
F D MONCKTON, Clerk.
By MEREDITH SAWYER,
Deputy Clerk.

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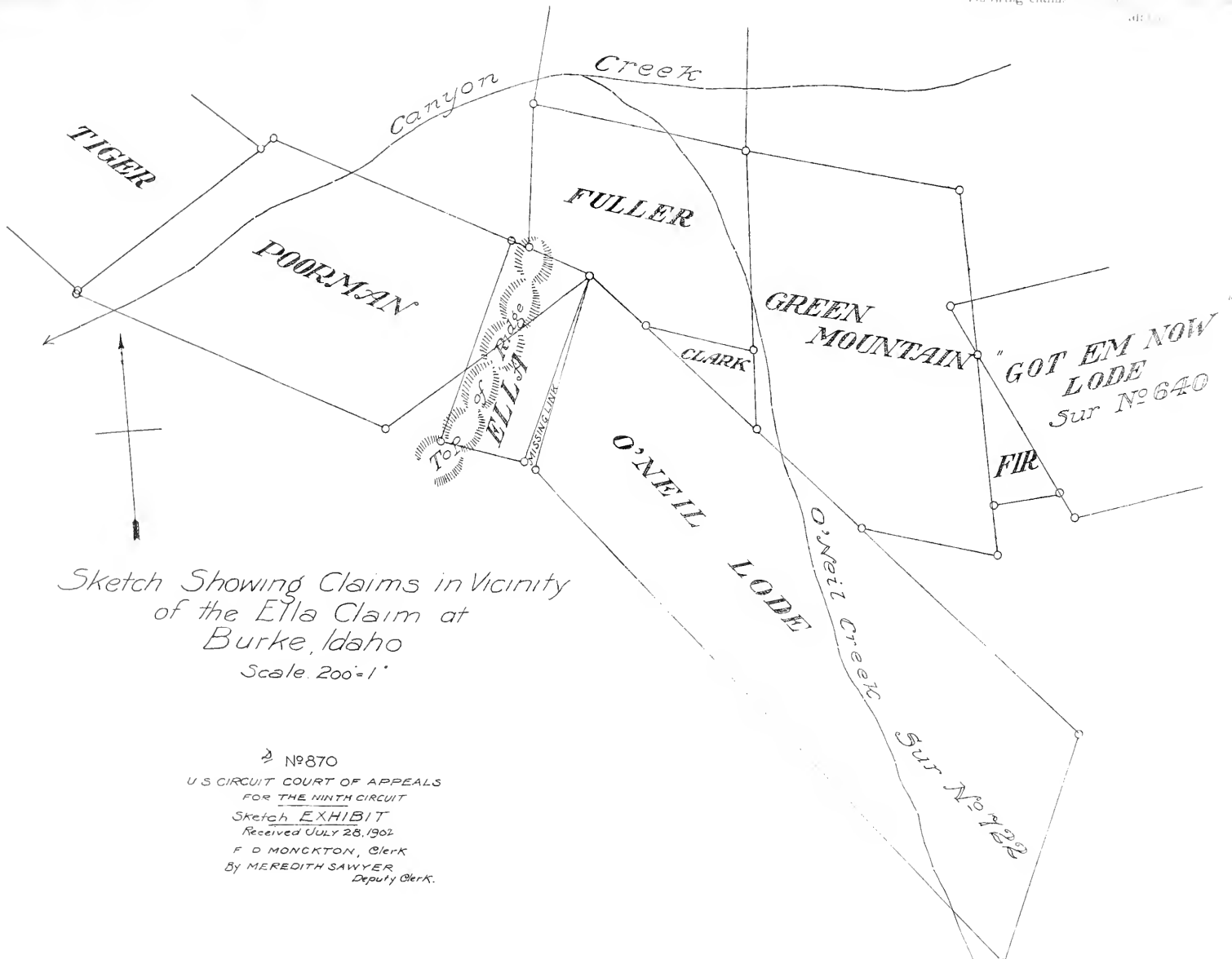


NEW, ENTIRE, COPY

General description
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the system of the
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Sketch Showing Claims in Vicinity
of the Ella Claim at
Burke, Idaho
Scale: 200'-1"

2 N^o 870
 U.S. CIRCUIT COURT OF APPEALS
 FOR THE NINTH CIRCUIT
 Sketch EXHIBIT
 Received JULY 28, 1902
 F. D. MONCKTON, Clerk
 By MEREDITH SAWYER
 Deputy Clerk.



Sketch of the
Shaft

SKETCH OF THE SHAFT

POORMAN

1500
PUMP

TIGER SHAFT

1200 FT LEVEL



EXHIBIT

— PLAN —

OF A PORTION OF 1200 FT LEVEL

THE TIGER-POORMAN MINE

Scale 40 ft = 1 in

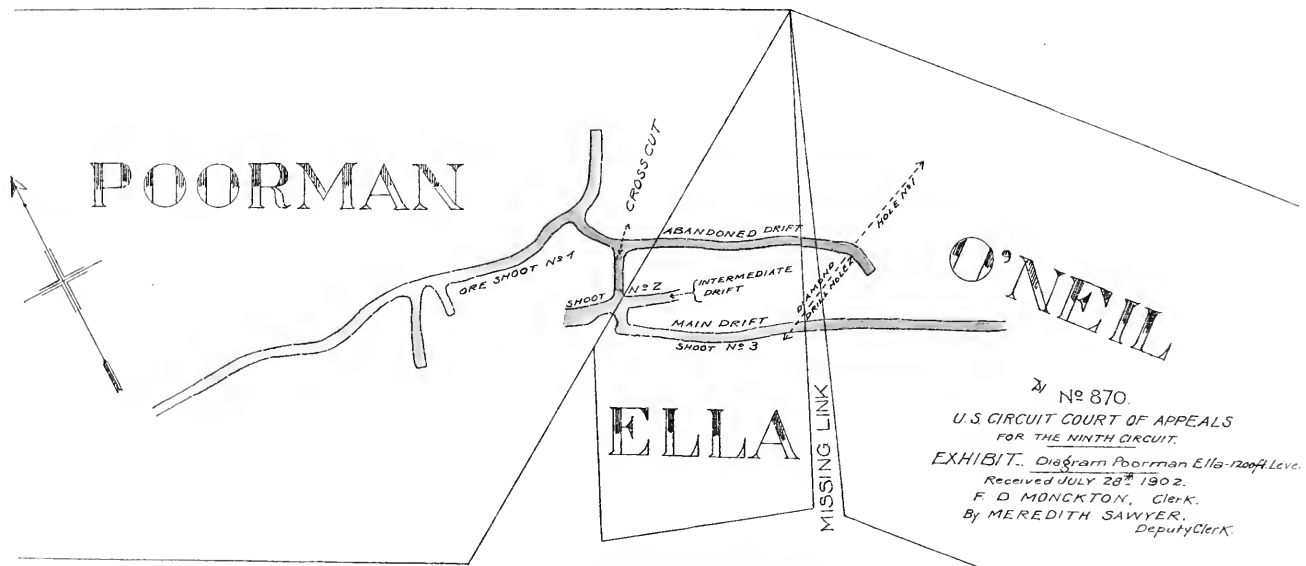
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COURT OF APPEALS
FOR THE NINTH CIRCUIT
LAWYER
M. M. REDITH SAN FRANCISCO

NEW BOTTING MACH

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1200 FT. LEVEL



No 870.
 U.S. CIRCUIT COURT OF APPEALS
 FOR THE NINTH CIRCUIT.
 EXHIBIT. Diagram Poorman Ella-1200ft. Leve.
 Received JULY 28th 1902.
 F. D. MONCKTON, Clerk.
 By MEREDITH SAWYER,
 Deputy Clerk.

SCALE 20 FT. = 1 INCH
 (Reduced to 100 Ft. = 1 Inch)

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PORT



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*In the Circuit Court of the United States, for the District of
Idaho, Northern Division.*

PATRICK CLARK, BENJAMIN C.
KINGSBURY, JAMES P. HARVEY,
and A. J. KERNS, Administrator of
the Estate of James Clark, Deceased,
Complainants,

vs.

BUFFALO HUMP MINING COM-
PANY (a Corporation), and EMPIRE
STATE-IDAHO MINING and DE-
VELOPING COMPANY (a Corpora-
tion),

Defendants.

Praeceptum Relative to Affidavit of Arthur A. Booth.

To the Clerk of the Above Court.

We have heretofore orally requested you to make a part of the transcript in this case, the affidavit of Arthur A. Boothe, concerning which you have since advised us that Judge Beatty directed you not to do so, also stating that he had not used the affidavit of Boothe upon the hearing.

We now respectfully request you to make a copy of that affidavit, and attach it to the transcript with a special certificate from you stating the facts.

Respectfully,

STOLL & MacDONALD,

M. J. GORDAN,

W. W. WOODS,

Solicitors for the Complainants and Appellants.

[Endorsed]: No. 247. United States Circuit Court Northern Division, District of Idaho. Patrick Clark et al. vs. Buffalo Hump Mining Company et al. Praecipe. Filed July 16, 1902. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division.

PATRICK CLARK, BENJAMIN C.
KINGSBURY, JAMES P. HARVEY,
et al.,

Complainants,

vs.

BUFFALO HUMP MINING COM-
PANY (a Corporation), and EMPIRE
STATE-IDAHO MINING and DE-
VELOPING COMPANY (a Corpora-
tion),

Defendants.

No. 247.

Affidavit of Arthur A. Booth.

State of Washington, }
County of Spokane. } ss.

Arthur A. Booth, being first duly sworn, on his oath deposes and says:

Affiant says that he is forty-two years of age, and is by profession a Mining Engineer and United States

Deputy Mineral Surveyor, and has been engaged in such profession for sixteen years last past.

Affiant says, that from the 1st day of September, 1899, up to the 7th day of July, 1900, he was in the employ of the Buffalo Hump Mining Company one of the defendants above named as underground Surveyor, for the purpose of making complete and accurate survey of the underground workings of the Tiger and Poorman mining claims, situated at Burke, Idaho at that time owned and operated by the said Buffalo Hump Mining Company the defendant herein. That during the course of his employment he made a complete survey and map of the 1200 foot level of said underground workings, which map was known as the "progress" map of said workings.

Affiant says that he is acquainted with one Thomas Jay who has made and served an affidavit in the above-entitled action, and that he has read the said affidavit and knows the contents thereof, and affiant says that the statements therein contained are misleading and incorrect, wherein the said Thomas Jay states that at the time of his going to work on the said properties he made an examination of the Progress map of the Buffalo Hump Mining Company, which contained a complete map of all its workings in its mines and discovered thereon three diamond drill holes beginning at the points marked "A" "B" and "C" on the sketch attached to the affidavit of said Jay, and marked exhibit "A" and made a part of said affidavit, and affiant further states that he has carefully examined the said map exhibit "A" and the location of the diamond drill holes as indicated thereon, and

affiant says that he knows of his own knowledge that the said map and said statements are misleading and incorrect, and that the said diamond drill holes are not at the points indicated on the said map, nor do they have the course indicated thereon.

Affiant further says that, referring to the sketch attached to the said affidavit of said Thomas Jay, that the diamond drill hole shown at the point marked "A" thereon, does not exist at said point, but that said diamond drill hole is located about 90 feet easterly of said point, marked "A" on said map exhibit "A" attached to said affidavit. That the diamond drill hole indicated at point "B" on said map exhibit "A" to said affidavit, does not exist at said point, but that said diamond drill hole is at least twenty feet westerly of said point as referred to.

Affiant further says that the course of the said diamond drill hole indicated as "B" upon the said sketch attached to the said affidavit of Thomas Jay is not correct, and that said diamond drill hole does not at any point in its course enter or penetrate the ground, or any ground, of the Ella lode claim, as shown on said map, as above referred to.

Affiant further states of his own knowledge that the crosscut referred to in the affidavit of the said Thomas Jay as having been run along the course of the said diamond drill hole, was not run along the course of said

diamond drill hole, and that the said diamond drill hole was not cut into by said crosscut at any point, and that the same is still intact and to be seen at the point marked "B" on the plat attached to this affidavit.

Affiant further says that the diamond drill hole indicated by the letter "C" upon the plat attached to the affidavit of said Thomas Jay is incorrect and misleading, in this, that the true course of said diamond drill hole is not shown upon said map, and affiant further states that, in his opinion, the said diamond drill hole so indicated on said map by the letter "C" does not at any point penetrate the ground of the Ella mining claim, as shown in the said map.

Affiant further states that he has attached hereto and made a part of this affidavit a plat marked Exhibit "A," upon which is shown correctly the underground workings of said mines on the said 1200 foot level, together with correct location and course of all the diamond drill holes bored in the vicinity of what is known as the abandoned drift on said level.

Affiant further states, that he knows of his own knowledge, gained as such underground engineer, in surveying the underground workings of said mines, and measuring the stopes therein for the purpose of making maps of said underground workings, that at no point in said underground workings did he see fifteen feet of first-class

ore, and affiant further states that at no point on the 1200 foot level of the said underground workings of said mine is there fifteen feet of first-class ore to be found or fifteen feet of any class of ore to be found there.

ARTHUR A. BOOTH.

Subscribed and sworn to before me this 11th day of September, A. D. 1901.

[Seal]

W. B. SAMS,
Notary Public.

[Endorsed]: No. 247. In the Circuit Court of the United States for the District of Idaho, Northern Division. Patrick Clark et al, Plaintiffs, vs. Buffalo Hump M. Co. et al., Defendants. Affidavit of A. A. Booth on Application for Receiver and Injunction.

Filed September 13, 1901. A. L. Richardson, Clerk.

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*In the Circuit Court of the United States, for the District of
District of Idaho, Northern Division.*

PATRICK CLARK, BENJAMIN C.
KINGSBURY, JAMES P. HARVEY,
and A. G. KERNS, Administrator of
the Estate of James Clark, Deceased,
Complainants,

vs.

BUFFALO HUMP MINING COM-
PANY (a Corporation), and EMPIRE
STATE-IDAHO MINING and DE-
VELOPING COMPANY (a Corpora-
tion),

Defendants.

Clerk's Certificate.

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify the foregoing transcript to be a full, true and correct copy of the praecipe and affidavit of Arthur A. Booth, filed in the above-entitled cause upon the application for receiver and injunction in said cause.

I further certify that the Honorable James H. Beatty, presiding Judge of said court, stated to me that neither the aforesaid affidavit of Arthur A. Booth, nor any of the proceedings upon the motion for an injunction herein, were considered upon the trial of said cause, and ought not to be made a part of the transcript on appeal in said

cause unless upon notice and the consent of opposing counsel. That I notified W. B. Heyburn, Esq., solicitor for the defendants, who refused to consent to said affidavit being included in the transcript in said cause.

Witness my hand and the seal of said Court, this 22d day of July, A. D. 1902.

[Seal]

A. L. RICHARDSON,
Clerk.

*In the Circuit Court of the United States, in and for the
District of Idaho, Northern Division.*

PATRICK CLARK, BENJAMIN C.
KINGSBURY, JAMES P. HARVEY,
and A. G. KERNS, as Administrator
of the Estate of James Clark, De-
ceased,

Complainants,

vs.

BUFFALO HUMP MINING COM-
PANY (a Corporation), and EMPIRE
STATE-IDAHO MINING and DE-
VELOPING COMPANY (a Corpora-
tion),

Defendants.

Clerk's Certificate as to Filing of Affidavit.

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify that the affidavit of A. A. Booth filed in the above-entitled cause on the 13th day of September, 1901, upon the motion for receiver an injunction was filed, at the in-

stance of counsel for defendants and upon behalf of the defendants in said cause.

Witness my hand and the seal of said Court this 26th day of July, A. D. 1902.

[Seal]

A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 870. In the United States Circuit Court of Appeals for the Ninth Circuit. Patrick Clark, Benjamin C. Kingsbury, James P. Harvey, and A. G. Kerns, Administrator of the Estate of James Clark, Deceased, Appellants, vs. The Buffalo Hump Mining Company, a Corporation, and The Empire State-Idaho Mining and Developing Company, a Corporation, Appellees. Certified Copy of Affidavit of Arthur A. Booth, Praeceptum that Same be Made a part of Transcript of Record and Certificate of Clerk of United States Circuit Court, Stating Reasons for not Obeying Praeceptum. Upon Appeal from the United States Circuit Court, for the District of Idaho, Northern Division.

Filed July 31, 1902.

F. D. MONCKTON,
Clerk.



IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

PATRICK CLARK, BENJAMIN C. KINGSBURY,
JAMES P. HARVEY and A. G. KERNS, Ad-
ministrator of the Estate of JAMES CLARK,
Deceased,

Appellants,

vs.

THE BUFFALO HUMP MINING COMPANY
(a Corporation), and THE EMPIRE STATE-
IDAHO MINING & DEVELOPING COMPANY
(a Corporation),

Appellees.

FILED
SEP 28

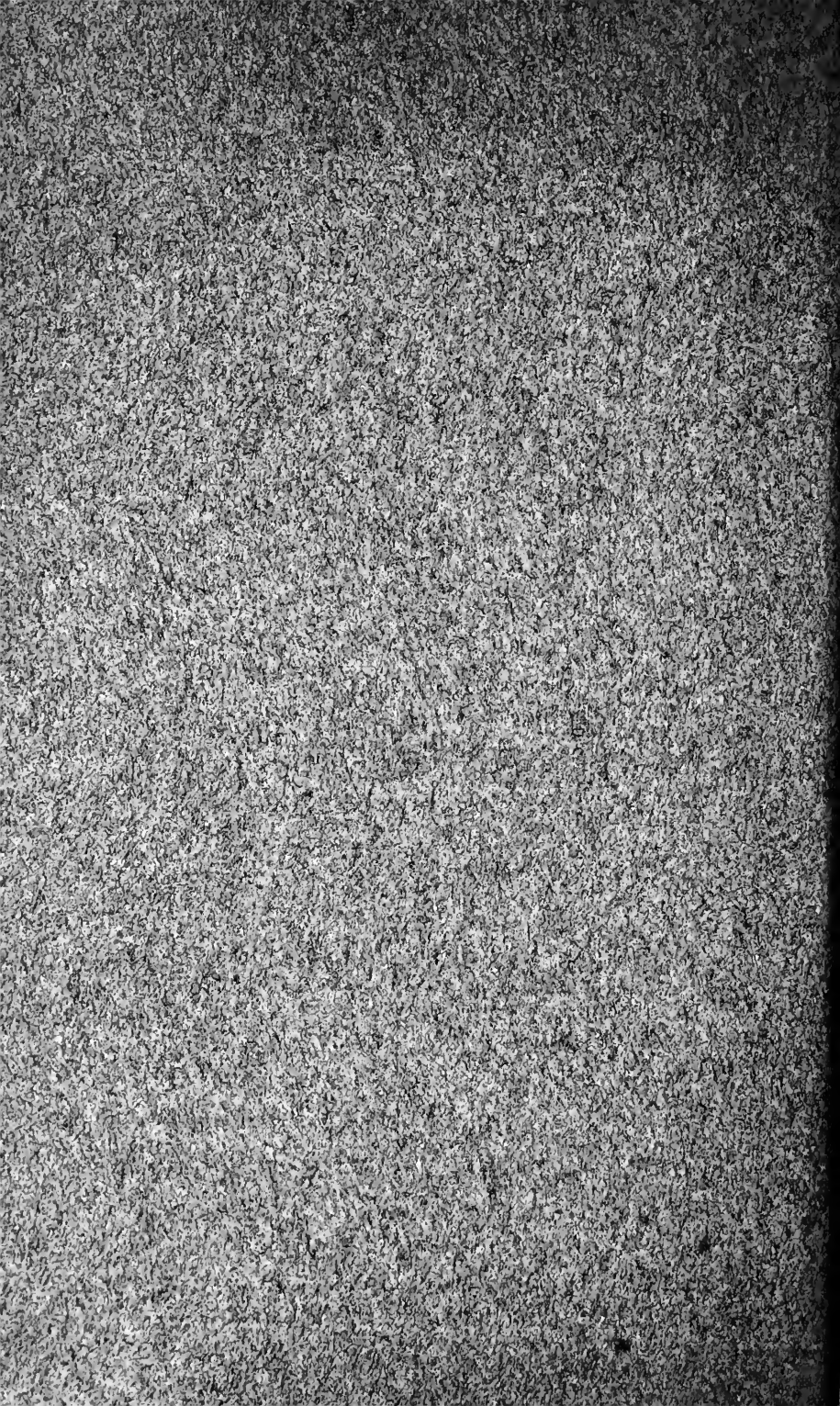
APPELLANTS' BRIEF.

STOLL & MACDONALD,

W. W. WOODS,

M. J. GORDON,

Solicitors for Appellants.



IN THE
UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

PATRICK CLARK, BENJAMIN C. KINGSBURY,
JAMES P. HARVEY and A. G. KERNS, Ad-
ministrator of the Estate of JAMES CLARK,
Deceased,

Appellants,

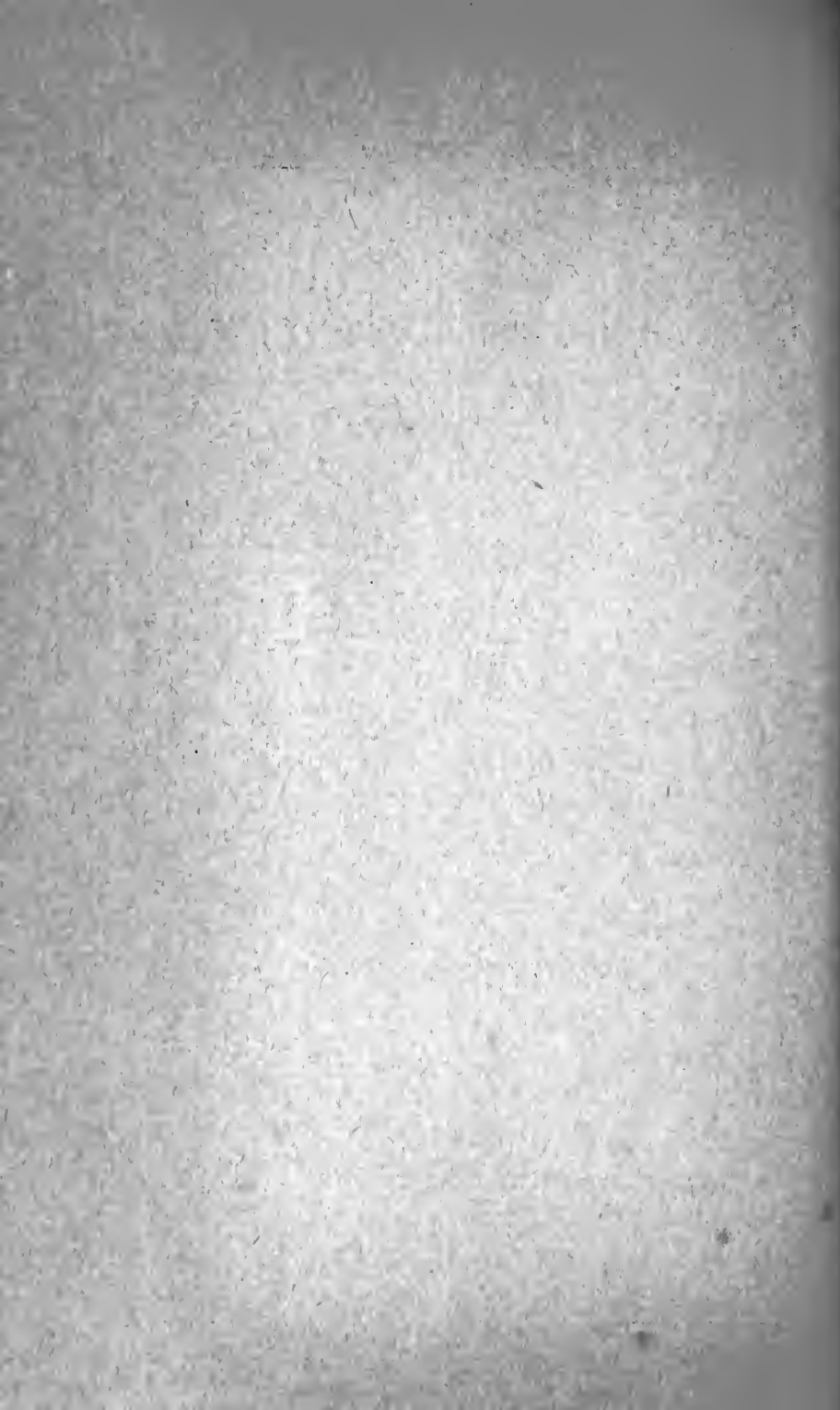
vs.

THE BUFFALO HUMP MINING COMPANY
(a Corporation), and THE EMPIRE STATE-
IDAHO MINING & DEVELOPING COMPANY
(a Corporation),

Appellees.

APPELLANTS' BRIEF.

STOLL & MACDONALD,
W. W. WOODS,
M. J. GORDON,
Solicitors for Appellants.



STATEMENT.

This suit is brought to cancel a conveyance made by the complainants to the defendant, the Buffalo Hump Company, and by that Company to the defendant, the Empire State Company, of a four-fifths interest in the Ella and Missing Link mineral claims at Burke, Idaho, which lie between the Poorman mine and the O'Neill mine, and extending about 200 feet in length, upon the ground that a fraud was perpetrated upon the complainants at the time of their conveyance, same consisting of false representations as well as the concealment of material facts concerning the condition of, value, and ore discoveries within the property. Both claims are patented. The Poorman mine is owned by the defendant, the Empire State Company, and was owned by the defendant, the Buffalo Hump Company, at the time, and long prior to the conveyance by the complainants to it of the Ella and Missing Link; and at all those times the Buffalo Hump Company owned an undivided one-third interest in the O'Neill mine, lying east of the Ella and Missing Link, which interest is now owned by the Empire State Company. *Neither the Buffalo Hump Company nor the Empire State Company owned any interest in or had any right to enter the premises in controversy in this suit, either for the purpose of prospecting the same or of passing to and from the O'Neill ground (in which they owned an interest) prior to the 20th day of October, 1899.* The Poorman mine

crosses Canyon creek at practically right angles, and extends up a steep, precipitous mountain therefrom. The Ella and Missing Link, being on its end, are correspondingly higher up the mountain. The bill alleges:

“That the country there and thereabouts is broken and the mountains precipitous and high. * * * Both of said mining claims being at a point on said mountain more than 1200 feet above the level of said Canyon creek. * * * That during the summer and fall of 1899 the defendant, the Buffalo Hump Mining Company, was mining extensively upon said Tiger and Poorman mines, and had a combination shaft sunk thereon * * * which shaft started at about the level of Canyon creek and extended downward to the 1600 foot level. * * * And the defendant, the Buffalo Hump Mining Company, was entitled to the exclusive possession of all the workings within said Tiger and Poorman mines, and no other person than the owner or those authorized by it were entitled to have access to the workings therein, or to any information concerning such workings, or the condition or value or extent of the ore reserves therein, or any part thereof. That the drifts and stopes throughout the said Tiger and Poorman mines from the said combination shaft to the Ella line were more than 2000 feet in length, and were winding and circuitous in their courses.”

(See Par. V of bill).

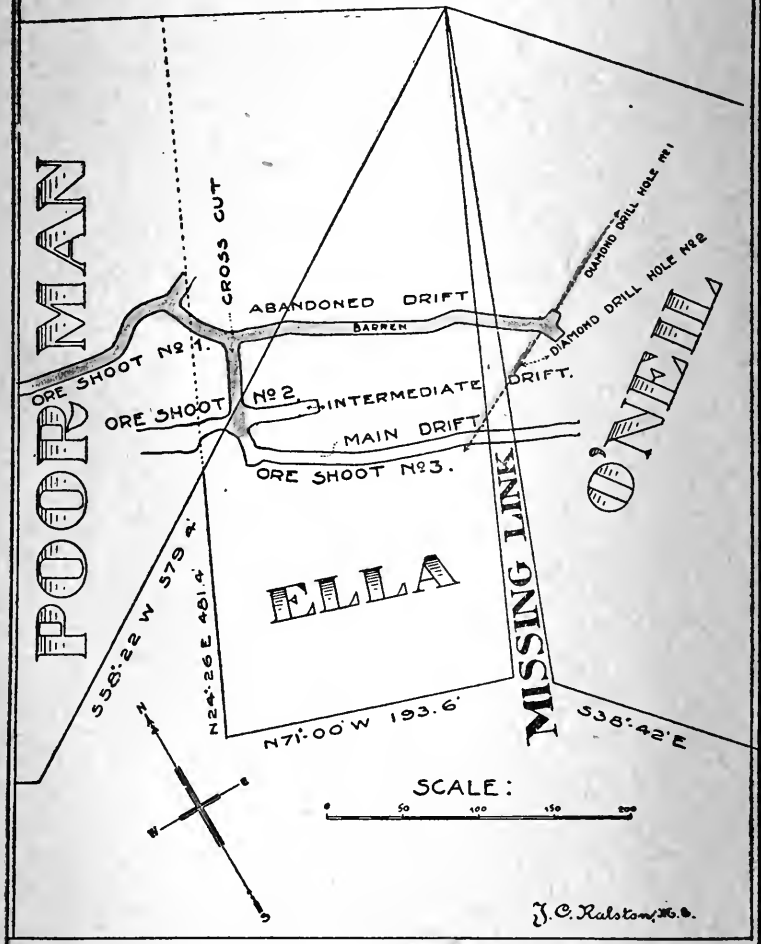
These allegations of the bill are undenied, and therefore admitted. The complainants had worked the Ella and Missing Link to the 800 foot level, and they charge, and the proof on both sides is, that the ore was practically exhausted when they discontinued working there in 1894. The vein extending through the premises in controversy is what has been known as

the Tiger-Poorman vein. A large continuous ore shoot extends through the Tiger and Poorman, and runs very close to the Ella line. At that place on the main vein the ore discontinues, but the defendants, or somebody representing them, extended the drift on the 1200 foot level beyond the east end of the Poorman and through the Ella and Missing Link claims into the O'Neill claim. This ground was found to be barren from the end of the Poorman line easterly through the Ella, Missing Link and O'Neill; but the Buffalo Hump Company concluded to prospect for the ore that disappeared at the end of the Poorman as aforesaid. To that end they ran a diamond drill hole called "diamond drill hole No. 2." This hole was started within the O'Neill claim, thirty feet east of our line, but was run at such an angle as to, and in fact it did, strike the ore a very few feet within our lines. They then dropped back 210 feet to the west and started a cross-cut. This cross-cut was started within defendant's ground (the Poorman claim), thirty feet west of our west line, but that cross-cut was run at such an angle as to, and in fact it did, strike the ore a very few inches within our lines. Sixteen feet of ore was encountered in drill hole No. 2. Our witnesses say six feet of it was clean shipping ore, defendant's witnesses say six feet of *good concentrating* ore. The cross-cut struck, our witnesses say, fifteen feet of ore, four feet of clean shipping ore; defendant's witness (they had only one on this point) said it was very insignificant, six inches or thereabouts. The course of the diamond drill hole (No. 2)

and the cross-cut were so convergent that they would have intersected each other if driven about 325 feet.

The following figure illustrates the 1200 foot level where the drill hole and cross-cut were driven:

FIG. 1
1200 FT. LEVEL



GREEN

Indicates extent of defendants' (appellees') trespasses prior to delivery of complainants' (appellants') deed.

“Abandoned drift” shows the continuation of the main drift from the Poorman through the premises in controversy, and is in barren ground. Diamond drill hole No. 1 and diamond drill hole No. 2 show the points at which, and the courses in which, the defendant, Buffalo Hump Company, ran diamond drill holes prospecting for the ore that was lost on the Poorman mine. These diamond drill holes were run early in August, No. 1 being run first, No. 2 immediately thereafter. The ore was struck in the Ella by diamond drill hole No. 2 August 13, 1899. Diamond drill hole No. 3 was run immediately after that, and the ore struck in the month of August. It penetrated only a small body of ore within the Poorman ground. The cross-cut, which is indicated on Fig. 1 as “Cross-cut,” was started early in September, and was run with the evident purpose of tapping the ore that had been struck by the diamond drill holes south of the abandoned drift. The ore was struck in the cross-cut on the 8th of October. The size of the ore body which was there encountered is material. It was demonstrated at the time of the conveyance that a very rich mine was probably contained within the premises in controversy.

It is admitted that the Buffalo Hump Company had not received authority, express or implied, from the complainants to prospect nor in any manner whatsoever to use or take possession of either the Ella or Missing Link claims. It is further conceded that the complainants were advised *after the abandoned drift had been prosecuted through the Ella and Missing Link that the same had been driven, and that no ore had been*

found therein; but they were not advised before their conveyance that any other or further prospecting, either by diamond drills, cross-cuts, or otherwise, had ever been made in or upon either the Ella or the Missing Link. It is further conceded that when the ore was struck in the cross-cut and by the diamond drill the complainants were not advised, nor were they ever advised by the defendants or either of them or by their employees of those facts.

Mr. F. R. Culbertson was the resident manager of the Buffalo Hump Company at all times mentioned in the bill. He owned a one-fifth interest in the Ella and Missing Link claims, as a tenant in common with the complainants at all such times. The bill charges (but Mr. Culbertson denies) that this interest was deeded to him by the complainants for the purpose of compensating him for his services in watching the said Ella and Missing Link claims, and in the event that the workings in the adjacent mine (Poorman) developed any ore bodies so near the Ella line as to be probable that the same extended into and through the Ella, he should advise the complainants of that fact (see Par. VI of the bill). The bill charges that after the ore had been struck by diamond drill hole No. 2, Mr. Culbertson, occupying the dual position of tenant in common with the complainants and resident manager of the Buffalo Hump Company, for the purpose of defrauding complainants out of their interest in the Ella and Missing Link claims, falsely stated to the complainant, Mr. Clark, that he had sold his interest in the Ella and Missing Link lodes to the Buffalo

Hump Company for the sum of \$500, and that no ore had been discovered either in the Ella or Missing Link, or so near the Ella line as to be probable that the same extended into or through the Ella. Mr. Culbertson denies this. It is further charged in the bill that Mr. Charles Sweeny was the general manager of the Buffalo Hump Company and also of the Empire State Company, at all the times mentioned in the bill; that on the thirteenth day of October, 1899, for the purpose of cheating and defrauding the complainants out of their interest in the Ella and Missing Link, he stated to the complainant, Mr. Patrick Clark, at the city of Spokane, that the Buffalo Hump Company had purchased the interest of Mr. Culbertson aforesaid for the price of \$500.00; that the Ella and Missing Link claims were no good, and had no value as mineral claims; that they were not worth fifteen dollars, and were only valuable to the Buffalo Hump Company for surface rights, and as a means of access to and from the O'Neill claim, in which the Buffalo Hump Company owned a third interest. He and Mr. Culbertson suppressed from the complainants all ore discoveries within the Ella aforesaid, and the fact that trespasses at depth had been committed on the Ella and Missing Link claims, or that any ore had been discovered therein. The complainants, believing these representations, not knowing of the ore discoveries, nor of the prospecting, and not knowing of any trespasses committed upon their premises, by which large or any discoveries of ore were made, on the 20th day of October, 1899, executed deeds of conveyance to the Buffalo Hump Company for

a four-fifths interest in the Ella and Missing Link for the sum of \$4000. At that time it had been demonstrated that the premises were worth more than \$100,000, perhaps \$1,000,000. Mr. Culbertson did not convey his interest until more than a month afterwards. He claims to have received only \$1000 for his one-fifth, *but eleven dollars in United States revenue stamps are attached to his deed to the Buffalo Hump Company for that one-fifth, and were canceled by him.*

Different conversations between Mr. Culbertson, Mr. Sweeny and the complainant, Mr. Clark, were held at Spokane, a distance of about 140 miles from the Ella and Missing Link. The statements made by Mr. Culbertson and Mr. Sweeny as to the value, the failure to discover ore, etc., were believed by the complainant, Mr. Clark, because, among other reasons, they confirmed a belief that he had theretofore for many years entertained that the premises had no value, Mr. Clark himself having previously worked the claims for some years. It is admitted that no means of access to the Ella and Missing Link existed at the point where the ore was struck by the diamond drill and by the cross-cut, in fact, the 1200 foot level, except through the workings of the Buffalo Hump Company; that is to say, down its combination shaft, thence easterly through its drifts. The answer admits the finding of the ore by the diamond drill in drill hole No. 2 in the month of August, and it admits that \$25,000 worth *net* of ore had been extracted from the premises in controversy at the time of the filing of the answer September 13, 1901. This we deem a fair statement of the issues and

admitted facts, sufficient at least to enable the Court to comprehend at the outset the complainants' contention.

The sketch used by the Circuit Judge, copy of which is attached to his opinion at pp. 149 and 150, Vol. 1, Trans., is erroneous in that the scale is 30 feet to the inch, while it should be 60 feet to the inch. The mistake is apparent from the admitted facts. The Ella and Missing Link are over 200 feet long, as shown by the opinion, by the bill of complaint, and admitted by the answer, while the sketch shows them to be only half that length. The map used by the Court was one put in evidence by the defendants, as will appear from the following written across its face, to-wit: "Defts Ex. 5 I."

The Circuit Court decided the case in favor of defendants, and dismissed complainants' bill. In doing so, the Court found that the property at the time of the sale was worth more than complainants received for it and more than they would have taken for it, had they known the exact conditions then existing in the drill holes and in the cross-cut, and that the condition of the property at the time of the sale was not communicated to complainants; "that Sweeny, the general manager of the defendant companies, knew of the ore discovered in the drill holes and cross-cut and did not communicate such knowledge to the complainants;" "that independently of the value of the property, said Sweeny would have purchased it because of the situation and surface rights;" "*that complainants have not proven the fraud they charge by that clear and decided evidence which the law demands;*" "that complainants made

“no sufficient effort prior to the sale to ascertain the value of “the property;” and “that complainants delayed an unreasonable “time (eighteen months) in bringing the suit.”

**Specifications of Errors Relied Upon by
Appellants.**

The decree entered in this case dismissing complainants' bill is erroneous; because,

I.

1st. The evidence showed that the defendant, the Buffalo Hump Mining Company, procured the complainants to transfer to it, the property in controversy, by false and fraudulent representations made to the complainants, by the officers of the defendant company; because,

2nd. The evidence showed that the defendants secretly and clandestinely explored the premises in controversy, through the workings owned by and under the exclusive control of the defendants, without the knowledge or permission of the complainants, and that in doing so, they committed trespasses, and at the time of making the purchase of the premises in controversy, suppressed from the complainants, the ore discoveries within the premises in controversy, for the purpose of cheating and defrauding the complainants, the complainants not having equal means of knowledge thereof; because,

3rd. The evidence showed that the consideration paid to the complainants for the purchase of the premises in contro-

versy, was so grossly inadequate as to make the sale fraudulent; because,

4th. The evidence showed that if the defendants had not fraudulently concealed and suppressed from the complainants the condition of the premises in controversy at the time of the sale, a matter which was exclusively within the knowledge of the defendants, complainants would not have assented to the sale.

II.

Because said decree is contrary to the evidence.

III.

Because said decree is contrary to law.

IV.

Because the decree should have been in favor of the complainants, according to the prayer of the bill of complaint.

V.

The Court erred in holding that complainants made no sufficient effort, prior to the sale, to ascertain the value of the premises.

VI.

The Court erred in holding that complainants have not proven the fraud they charge, by that clear and decided evidence which the law demands.

VII.

The Court erred in holding that complainants in delaying for over eighteen months to commence their action have not shown

the best of faith, and that it was unreasonable that they should have been so long in making their discoveries; because,

The evidence showed that complainants filed their bill of complaint within a reasonable time, after becoming informed of the fraud perpetrated upon them, complained of in said bill, no intervening right having accrued.

VIII.

The Court erred in holding that a higher degree of caution is required, and more investigation demanded by a party selling a mineral claim than in selling any other character of property, before a charge of fraud can be established with reference to the same.

IX.

The decree should have been for the complainants, because the Court has found:

1st. That the property in question was, at the time of sale, of greater value than complainants received.

2nd. That the price received would not have been accepted had they known, at the date of the sale, the conditions then existing in the drill holes and cross-cut upon the property in controversy.

3rd. That Sweeny knew of the ore discoveries in the drill holes, and must have known something of the conditions in the cross-cut.

4th. That Sweeny did not communicate such knowledge to the complainants, or either of them.

ARGUMENT.

1. As to the False Representations.

The Circuit Judge found that the preponderance of evidence on the question whether the false representations charged in the bill had been made was against us, and it is upon that conclusion that we predicate our first important assignment of error. Upon this subject the Circuit Judge concludes as follows: "Sweeny's testimony is supported by that of his partner, Lewis Clark. Under the usual rules of evidence, this would be conclusive against that of Patrick Clark * * * " This is not a correct statement of the law from any standpoint, and the application of such a rule to this case has, we believe, been one of the principal causes for the Circuit Judge to misconceive the effect and weight of the evidence and arrive at what we believe to be an erroneous conclusion. We will now invite the Court's attention to a discussion of the evidence upon that question from which we earnestly contend that but a single conclusion can be drawn, viz.: That the false representations were made as charged in the bill and that any other conclusion is illogical.

Mr. Patrick Clark testifies (see page 479, Vol. II, Trans.)

"A. In the latter part of August, 1899, Mr. Culbertson came to me in my office in the Ziegler block and said: 'Do you know that your brother never gave me that one-twentieth interest in the Ella?' I said I did not know that. Well, 'he says that he did not; he promised it to me. I have kept my end of this contract; I did not find anything, and I want you to keep yours.' I said, 'I certainly will attend to it right

“at once. Have you found anything there?’ He says, ‘No, “we have not.’ Well, I said, ‘Why do you come after it at “this time?’ ‘Well,’ he said, ‘to tell you the truth, I have “made up my mind to leave that country. Mr. Sweeny and “his company have bought, as you know, the interest of my- “self and Mr. Glidden in Canyon Creek, and I am turning in “all the little odds and ends I have around there, and I have a “chance to get a few hundred dollars for this interest; that “is the reason. Beside that, we have had a good deal of labor “trouble there, and I am getting tired of it, disgusted with “it, want to get up and leave the country.’ I said, ‘All right.’ “* * * A. Yes. I asked him, ‘How much are you going “to get for it?’ or ‘How much can you get for it?’ He said, “I can get five hundred dollars for it; you can get the same for “yours, if you want it.’ I said, ‘I don’t want it; I am not par- “ticular about selling it just now; I think it is worth more “money.’”

And again (see p. 482, Vol. II, Tr.) as follows:

“A. Mr. Sweeny came to my office—(interrupted).

“Q. State the date.

“A. On the 13th of October, 1899, and stated that he want- “ed to buy the interests in some claims lying around the Ella “that his company already owned them.

“Q. You mean around?

“A. Around the Poorman. I asked him what interests he “referred to, and he named the Sheridan, the Ella and Miss- “ing Link. I asked him how he owned in the Ella. He said he “had bought Mr. Culbertson’s interest in the Ella and Missing “Link.

“Q. Did he state what he paid?

“A. He told me he paid him \$500. I told him he could not “get mine for that. And we talked the thing over for a while, “and I asked him why he wanted it, and he said he was form-

“ing a large corporation and he did not want any side partners
 “in and wanted to get that particular piece of ground, that
 “fraction, because it lay in between a claim that they then
 “owned—the O’Neill and the Poorman—and the only value
 “that it had was for its surface value, that it was not worth \$15
 “for the mineral that was in it. And he finally raised the price
 “to \$4000, and I sold it to him. He then offered me \$2500
 “for the Sheridan, which I refused to take; I owned a half
 “interest in the Sheridan; and he came back four or five days
 “later on and raised the price of the Sheridan to \$3000, and
 “I accepted it.

“Q. At the time of which you speak, Mr. Clark, did Mr.
 “Sweeny make any statement to you of having struck an ore
 “body in the Ella with a diamond drill or with a drift?

“A. None whatever.

“Q. Did he make any statement to you, or any disclosure of
 “any kind, as to whether ore had been struck in the Ella mine
 “near the Poorman?

“A. No.

“Q. Did you know at that time, or did your co-owners know
 “of there having been an ore body struck within the limits of
 “the Ella either by a diamond drill in the east or by a drift in
 “the west?

“MR. HEYBURN: We object as incompetent and imma-
 “terial.

“A. I knew nothing whatever about it.”

These two conversations are absolutely and in toto denied
 by both Mr. Sweeny and Mr. Culbertson, and their statements
 upon the subject are as follows. Mr. Culbertson said (see
 page 175, Vol. I, Trans.) :

“A. The understanding was that the probabilities were
 “that we would strike ore below the six and eight hundred;

“as they had found ore there and had mined it, there was no reason why the ore should not go down, why we could not expect to find it below; and in that event, why, we were to make the best arrangements possible with the Poorman Company for the working of this ore, and divide the proceeds. As to any agreement, or any talk being made about keeping them posted as to what future developments might bring forth, there was nothing of that kind mentioned.”

And again (see page ¹⁸² 128, Vol. I, Trans.)

“Q. Did any such conversation (referring to the conversation testified to by Mr. Clark) as that occur between you and Mr. Clark, the complainant in this case?”

“A. No such conversation ever occurred, or ever took place.”

Mr. Sweeny states in substance that the first time he spoke to Mr. Patrick Clark about the property was on the street, that he never was in Mr. Clark's office, and that it was between the 1st and 4th of October that he told him that (p. 839, Vol. 3, Trans.) “I intended to buy all the property through there on both sides. He had some property up there, and if he wanted to sell it to let me know what they wanted for it, and if we could agree on the price, I would buy it;” that on about the 13th of October Mr. Patrick Clark came to Mr. Sweeny's office and in the presence of Mr. Lewis Clark, Mr. Sweeny's partner, stated to him (Mr. Sweeny) that they had agreed upon a price for the property and said he would take \$4000 for the four-fifths interest; that nothing was said as to the value of the mine either by Mr. Sweeny or in the shape of an inquiry by Mr. Patrick Clark; that Mr. Sweeny for the defendant companies accepted Mr. Clark's proposition and thereafter paid the purchase

price pursuant to it. Mr. Lewis Clark testified to practically the same thing that Mr. Sweeny did with reference to the conversation between Mr. Patrick Clark and Mr. Sweeny.

An order was procured by the defendants at Portland, Oregon, from Judge Gilbert in the month of December, 1901, extending the time to take defendants' testimony and providing that the testimony of Mr. Charles Sweeney should be taken in the city of New York before Mr. Clarence De Witt Rodgers on the 13th day of December, 1901, and that the testimony of Mr. Culbertson should be taken at San Francisco, Cal. (see page 124, Vol. 1, Trans.) It will also appear that on the evening of the 12th of December, in the City of New York, when the defendants knew that complainant Mr. Patrick Clark and two of his counsel, Mr. Stoll and Mr. Gordon, had travelled from Spokane to New York for the express purpose of being present at the taking of Mr. Sweeney's testimony, defendants' counsel gave notice to Mr. Stoll, one of complainants' counsel, that Mr. Sweeney's testimony would not be taken in New York, but that it would be taken at Spokane at a later date, assigning no reason or excuse whatsoever (see p. 421, Vol. I, Trans.). It will also appear that 12 days' notice was given at Spokane of the taking of the deposition of Mr. Joseph MacDonald at Treadwell, Alaska, and every possible effort was made on the part of complainants to have the attendance of defendants' counsel at such hearing, offering to extend the time or change the date to suit his convenience, but without avail (see pp. 104 et seq. and 309, Vol. I, Trans.). Defendants did not appear, and after

the deposition of Mr. MacDonald was taken, a copy of it was served upon the defendants and they were requested to appear and cross-examine him at any time before the 90 days period in which they might take their testimony had expired, and that upon their signifying their intention to do so, complainants would furnish the witness Mr. MacDonald free of charge and expense to the defendants before the same notary at the same place in Alaska, but the defendants refused to accept this offer and moved the Court to strike the deposition from the files because prematurely taken (see page 108, Vol. I, Trans.). After the motion to strike the deposition had been overruled, and after defendants' time had expired in which to take their testimony, they applied to the Court for leave to cross-examine Mr. MacDonald, which leave was granted by the Court and defendants made the cross-examination at Treadwell, Alaska, on less than six days' notice to us (see page 355, Vol. I, Trans.).

An order was made at Boise, Idaho, by the Circuit Judge on the 13th day of September, 1901, (see page 1115, Vol. III, Trans.) authorizing complainants to enter the Ella and Missing Link claims with their engineer and assistants to examine and survey the same. That order was disobeyed by the defendants, and after complainants had once entered and made a partial examination, they were not allowed to return and complete it, although they gave notice at the time of their partial examination that it would require another visit and another examination to conclude it (see pp. 616-622, Vol. II, Trans.).

Under direction of Mr. Miller, the assistant manager, Mr. Cartwright, the superintendent, and assistants, dug a trench through the floor of the 800 claiming to have exposed a large and valuable body of mineral therein, but immediately covered it up, and when complainants' engineer, Mr. Ralston, and the complainant, Mr. Harvey, afterwards and in the presence of Mr. Cartright visited the 800 foot level for the purpose of verifying certain measurements and examinations which defendants claimed to have made and which complainants believed to have been erroneous, he did not call attention to the find in such trench, but allowed them to go away without an examination thereof, no doubt knowing that another session would complete the taking of testimony upon both sides. (See page 825, Vol. III, Trans.).

Mr. F. Lewis Clark was put upon the witness stand as a witness for the defendants at Spokane on the 7th day of January, 1902, at which time Mr. Charles Sweeny was *absent from Spokane*. (See pp. 680-2, Vol. II, Trans.) He was fully examined and cross-examined and withdrawn as a witness and no intimation made that he would be called again. At that session he made no mention of a conversation with Mr. Patrick Clark in the office of Mr. Sweeny, in the presence of Mr. Charles Sweeny. Afterwards, on the 31st day of January, and *after Mr. Charles Sweeny had returned to Spokane*, he was again called as a witness, at which time he testified to the conversation of Mr. Patrick Clark, in which he was in all respects corroborated by Mr. Sweeny. He also testified *that he remembered*

the identical places in the room where the three parties sat, describing it in detail (see pp. 932, 936-7, Vol. III, Trans.); said he remembered the conversation very clearly, and that it had suggested itself to him at the time of the commencement of this suit in the summer of 1900 when he was cruising off the coast of Maine, having received some Spokane newspapers containing an account of the suit. (See page 936, Vol. III, Trans.)

Mr. Culbertson was examined in San Francisco, pursuant to the order of Judge Gilbert, *supra*, because he was unable to come to Spokane. The record will show that Mr. Patrick Clark and two of his counsel, Mr. Stoll and Mr. Gordon, attended the taking of Mr. Culbertson's deposition in San Francisco, but Mr. Culbertson was afterwards produced as a witness at Spokane, where he gave testimony very much in conflict with the testimony given at San Francisco.

It is impossible to give both sides the credit of telling the truth upon the charitable theory that one is mistaken in his version, and it therefore becomes our duty to determine where the truth lies. This is not to be done by applying the rule announced by the Circuit Court that the greatest number of witnesses for or against a given proposition shall determine it, but it is to be determined by an examination and consideration of the whole case, the surroundings of the parties, their interest in the subject matter, the reasonableness or unreasonableness of their story, their reputation for truth and veracity if it has been called in question, the conduct of the parties to the

litigation, and finally we must not be unmindful of that elementary rule that provides that no case is to be proved by a higher degree of testimony *than from its nature it is susceptible*. Lord Mansfield thus announces the rule upon this subject :

“It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to “have produced, and in the power of the other side to have contradicted.”

Blatch vs. Archer, Cowp., 63 and 65 ; 1 Stark. Ev., p. 54.

This rule was quoted with approval by this Court in *Waterhouse, Limited, et al. vs. Rock Island & Alaska M. Co.*, 38 C. A., 281.

There is abundant authority that a conspiracy to defraud may be inferred from the circumstances under which the parties are found to have acted without direct evidence of a conspiracy.

Redding vs. Wright (Minn.). 51 N. W., 1056, and cases cited.

We challenge our friends upon the other side to show wherein Mr. Patrick Clark has been squarely contradicted upon a material matter by any other witness save these three, or where his reputation for truth and honesty is impugned in the slightest degree by anything in this record, nor is there anything unreasonable or inconsistent or suspicious about his testimony concerning the conversation to which we are now directing the Court's attention. We charge, and think the record supports it, that the story of Mr. Charles Sweeny and Mr. Lewis Clark

is absurd and unreasonable and is utterly and wholly inconsistent with truth.

It is conceded that Mr. Sweeny, on behalf of the defendant companies, was desirous of purchasing the property in controversy as early as June, 1899. At that time he, knowing that Mr. Culbertson was a tenant in common with the complainants, advised him "to get some opportunity to talk with Clark with "reference to his interest" (see page 274, Vol. I, Trans.), and in August of the same year Mr. Culbertson testified that he wrote Mr. Patrick Clark, among other things (see page 778, Vol. III, Trans.), "I have advised Mr. Sweeny to go and see "you about your interest," indicating that he (Culbertson) had been unsuccessful in his interview with Mr. Patrick Clark on the 22d, 23d, 24th or 25 of August, and therefore concluded to send Mr. Sweeny himself, and corroborates the testimony of Mr. Patrick Clark as to the conversation with Mr. Culbertson, particularly as to the time of the conversation. This letter is dated August 25th, and it is only reasonable to infer that the defendants had fully as great a desire to purchase the property in October after the strike in the drill hole on the east end encountered 16 feet of ore and the strike in the crosscut on the west disclosed an equally large body, so that Mr. Clark's testimony has much to support it when he says that Mr. Sweeny and Mr. Culbertson approached him at his office.

Mr. Sweeny and Mr. Culbertson both testified that in June of 1899 an arrangement was made between them by which Mr. Culbertson was to sell his interest in the "Ella" and the

“Missing Link” to Mr. Sweeny for the defendants, for the same price that Mr. Sweeny should pay the complainants, and both testified that he (Mr. Culbertson) did thereafter, pursuant to such arrangement, sell for the same price, to-wit: \$1000 for his one-fifth interest. Therefore there is much to support the contention of Mr. Patrick Clark that Mr. Sweeny stated to him that he had bought the interest of Mr. Culbertson.

The Circuit Court found that “independent of the value of “the property, said Sweeny would have purchased it because of “its situation and surface rights.”

Mr. Sweeny testifies to this practically, and Mr. A. B. Campbell did also. (See p. 544, Vol. II, pp. 839-40, Vol. III, Trans.) Therefore there is much to support the contention of Mr. Patrick Clark that Mr. Sweeny told him at the conversation, *supra*, (see p. 482, Vol. II, Trans.) that he “wanted to get that particular piece of ground, that fraction, because it lay in between a “claim that they then owned, the O’Neil; and the Poorman, and “the only value that it had was for *surface value*; that it was not “worth \$15 for the mineral that was in it * * *”

Mr. Sweeny testified that the property had no value to any one except his companies. (See p. 848, Vol. III, Trans.) Does this not lend color to the statements of Mr. Patrick Clark that Mr. Sweeny stated to him that the Ella and Missing Link were not worth \$15 for the mineral contained in them?

The utter absurdity of the conversation which Mr. Sweeny and Mr. F. Lewis Clark put into the mouth of Mr. Patrick

Clark is apparent when we stop to consider that he is supposed to have sold this property, the value of which depended upon development at depth, *without making a single inquiry* of the intending purchaser or of Mr. Culbertson of any strikes, or development at depth, in the adjoining property, which he knew the defendants were working on both ends of his property. Mr. Culbertson testified (p. 175, Vol. I, Trans.), *supra* :

“The understanding was that the probabilities were that we “would strike ore below the 600 and 800; as they had found ore “there, and mined it, there was no reason why the ore should “not go down, why we could not expect to find it below.”

Mr. Culbertson also testified at p. 244, Vol. I, Trans. :

“Mr. Clark hardly ever had much to say. He asked me “*how the Poorman ore was coming along.*”

(This was before the purchase). At p. 180, Vol. I, Trans., he testified :

“Mr. Clark asked me on one or two occasions as to what we “had found down there.”

(This was after the sale). It will be remembered that Mr. Sweeny testified that he applied to Mr. Patrick Clark on the 4th or 5th of October to purchase the Ella, and that the deal was not closed until Mr. Patrick Clark came to his office on the 13th, when he put his own price on the property and sold it without making an inquiry. We think it very extraordinary that Mr. Patrick Clark should inquire of Mr. Culbertson “*how the Poorman ore was coming along*” *before a sale* was thought of, and make a similar inquiry *after a sale*

was made, but during that period, between the 4th or 5th of October and the 13th, when a buyer able and willing was in sight, negotiations were pending and he was arranging with his partners to put a price upon the property, and when the same man from whom he made the inquiries, *supra*, was accessible, he should make no inquiries of him as to the condition of the property or the development of adjoining properties, nor make any inquiry at all of the intending purchaser, whom he knew was working on the adjoining property. And that he should have selected the 13th day of October, 1899, the identical time when the defendants had *completely penetrated a large body of ore in the crosscut on his property*, disclosing about 200 feet of continuous ore from the drill hole to the crosscut, worth, as Mr. Joseph MacDonald testified he told Mr. Sweeny, a million dollars. (See p. 295, Vol. 1, Trans.) The price paid, and which the defendants claim was put upon the property by Mr. Patrick Clark himself, \$4,000, was not the price of a mine, and could hardly be said to be the price of a prospect. Mr. Sweeny testified that he approached Mr. Clark to purchase his interest on the 4th or 5th of October, the purpose of this evidently being to fix it at a date before the crosscut struck the ore, but the answer which was signed by Mr. Sweeny on behalf of the defendants is in conflict with this date.

The answer of the defendants denies the conversations and the false representations, and in paragraph 7 (see p. 37, Vol. I, Trans.) uses this language: "Answering the seventh paragraph of the complainant's bill of complaint, these defendants

“severally say that it is true that about the *13th day of October, 1899*, and at all times since said date, Charles Sweeny was the “General Manager of the Buffalo Hump Mining Company, and “of the Empire State-Idaho Mining & Developing Company, “*and that about said date he entered into negotiations with Patrick Clark*, one of the complainants herein, with regard to the “purchase of the Ella and Missing Link lode claims, to the extent of the interest of the complainants therein.”

And again in the same paragraph (see p. 37, Vol. I, Trans.) the following appears :

“These defendants admit that the said Charles Sweeny, acting “for and on behalf of the defendant, the Buffalo Hump Mining “Company, *did offer to and pay the said Patrick Clark* and his “co-complainants herein the sum of four thousand dollars for “their undivided four-fifths interest in and to the said Ella and “Missing Link lode claims.”

And again in paragraph 8 (see p. 41, Vol. I, Trans.) appears the following :

“Or because of the complainants having no authority or opportunity of making a personal inspection of the underground “workings of the Buffalo Hump Mining Company, upon said “claims, or otherwise, accepted the price of four thousand dollars *offered by the said Sweeny* on behalf of the defendant, the “Buffalo Hump Mining Company.”

This answer was no doubt drawn and prepared after full consultation with counsel and with the greatest deliberation, and is not only signed by Mr. Charles Sweeny, but it is sworn to by him, and that, too, when answer under oath was waived by

the bill. He does not swear to it upon information and belief, but (see p. 52, Vol. I, Trans.):

“That he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief * * *”

This was not stated upon information and belief. Here is a sworn statement that Mr. Charles Sweeny, the General Manager of the defendant companies, on about the 13th day of October, 1899, *did offer to and pay the complainant Patrick Clark*. At that time defendants evidently felt secure in the belief that complainants could make no proof of the fraud charged in the bill. In other words, the exigencies arising in the closing hours of the trial necessitating a complete change of front with reference to this conversation as to time, place and persons present, had not arisen. No necessity or motive existed at the time of filing the answer for Mr. Sweeny to testify falsely, but it was otherwise when he was on the stand. Which oath, then, that he took is entitled to the greatest credit? Which piece of testimony possesses the greater value? That sworn to in the shape of an answer in the beginning of the trial, or that sworn to by him upon the stand, made necessary by the exigencies of a desperate case?

There was an affidavit filed in this case on the 13th of September, 1901, by Mr. Sweeny simultaneously with the answer, and a copy of it will be found at page 999, Vol. III, Trans. That affidavit was filed in opposition to an application that was made at that time for the appointment of a receiver. A com-

promise order was thereafter agreed upon by the parties and the application for the receiver withdrawn. (See p. 1115, Vol. III, Trans.) In that affidavit Mr. Sweeny purports to state very fully and in detail the facts within his knowledge pertaining to defendants' case. The bill upon which the suit was based had very specifically stated that the false representations claimed to have been made by Mr. Sweeny to the complainant, Mr. Patrick Clark, were made on the 13th day of October. (See paragraph 7 of the bill.) The affidavit of Mr. Sweeny does not deny the date, nor claim that it was at any other day, nor does it fix any day in the affidavit. No statement is there made that the conversation or that any conversation was had in the presence of Mr. F. Lewis Clark. True, these circumstances are not conclusive, yet they are, we think, powerful circumstances militating against the defendants, and when taken in connection with the other facts in the case lead one to the conclusion that the date (October 4th or 5th) and the conversation at the office of Messrs. Clark and Sweeny were each an afterthought, found necessary at the closing hours of the trial to meet the exigencies of what not only appeared to be, but what was in fact, a desperate situation.

Again, we contend that it is unreasonable that he should speak to Mr. Patrick Clark on the 4th or 5th, when he must have known that within a few days the crosscut would strike the ore. *He was enthusiastic over the strike in the drill hole when advised of it by Mr. Culbertson in August.* (See p. 272, Vol. I, Trans.) Ore had been struck in No. 2 and No. 3 and

No. 4 drill holes. Mr. Sweeny and Mr. Culbertson both testified that a strike in a drill hole could not be depended upon, and they were evidently going to verify those strikes by running a crosscut midway between hole No. 2 and hole No. 4, and that crosscut reached the ore on the *8th day of October*. (See testimony of Mr. Thomas Jay, defendants' foreman, at p. ⁴²⁹427, Vol. I, Trans.) It required about five days to get through the ore, which would be the 13th, at which time the defendants were certainly ready to purchase. The size of the ore body in the drill holes and crosscut is important in determining two questions: 1st, the probability of Mr. Patrick Clark, *who did not know of the existence of either*, applying to Mr. Sweeny to purchase his ground on the *identical day when the crosscut was completed*, and *fixing his own price upon it*; and, 2nd, the probability as to whether or not Mr. Sweeny was the moving party and made any statements at all with reference thereto. The size of that ore body is shown by Mr. Thomas Jay, the foreman of defendants, Mr. Amos Jay, the shift boss, Mr. Joseph MacDonald, consulting engineer, Mr. N. H. Wright, diamond drill man, Mr. Ralston and Mr. Porter, no part of which was ever contradicted or denied by anybody, except the size of the crosscut by one witness of the name of Stone. Mr. Sweeny's estimate of it was shown by statements made some time thereafter to Mr. Albert Allen (see pp. 672-7, Vol. II, Trans.), Mr. James N. Justus (see p. ⁵⁸²584, Vol. II, Trans.), and Mr. Jacob Rice (see pp. 585-6, Vol. II, Trans.), and that Mr. Sweeny's optimistic views expressed to these parties were fully warranted has been shown by subsequent development

of the property. (See Mr. Sweeny's annual report, complainants' Exhibit 17, p. 1165, Vol. IV, Trans.)

If the size of the ore body in the drill hole and the cross-cut was not so large or so valuable as complainants' witnesses testified, it was quite within the power of defendants to have contradicted it. They had the possession of the property at all times, their shafts and drifts being the only means of access to the underground works in the Ella and Missing Link. (See p. 34, Vol. I, Trans., Par. V., Ans.) They had a large number of miners working in it, they kept a progress map, they had the assay values of the ore—in fact, they had a complete record of the size, value and history of every foot of it, yet they made no effort to contradict either the size or the value, except *indirectly, by testimony of a most uncertain and most untrustworthy character*. It is a well recognized rule of law that where a party withholds evidence in his possession calculated to clear up a doubt or difficulty, the conclusion may be drawn and the inference is, that the evidence, if given, would militate against him. *Clifton vs. U. S.*, 4 How., 242; *Railway Co. vs. Ellis*, 4 C. C. A., 454; *Frank Waterhouse, Limited, et al. vs. Rock Island & Alaska Mining Co.* (Ninth Circuit), 38 C. C. A., 281; *Frick vs. Barber*, 64 Pa. St., 120. And where witnesses refuse to explain what they can explain, the presumption is that the explanation would be to their prejudice, and in principle this would apply to a party. *Heath vs. Waters*, 40 Mich., 457.

There are too many strange circumstances occurring on the 13th of October, all to the advantage of the defendants and all to the disadvantage of complainants, to warrant the conclusion that defendants acted honestly with Mr. Patrick Clark and that their version of the conversation had on that day was true, to-wit: Mr. Patrick Clark, *who had never been in the office of Merris Clark & Sweeny before* (this is not denied), went to that office for the purpose of selling the Ella and Missing Link, *put his own price upon it, asked no questions, and did all this in the convenient presence of both Mr. Charles Sweeny and Mr. F. Lewis Clark*; that Mr. F. Lewis Clark should have remembered with such vividness and great particularity *where each of the parties in the room sat at the time of the conversation; that the ore body in the crosscut should have been completely penetrated on that very day*; that Mr. Edwin Packard, President of both companies, should have arrived at Spokane on the evening of October 12th (see p. 1075, Vol. III, Trans.); that Mr. Charles Sweeny should at that time have had the benefit of the opinion of an eminent mining expert—Mr. Joseph MacDonald—that the Ella and Missing Link *were worth a million dollars* (Mr. Sweeny bought the Tiger-Poorman mines on the oral report to him of this same Joseph MacDonald); that Mr. Sweeny should have urged upon Mr. Joseph MacDonald not to tell Mr. Patrick Clark anything about the strikes, *as he wanted to buy him (Mr. Patrick Clark) out for a song*; and that he (Mr. Joseph MacDonald) should not employ anybody in the drift at that end of the mine that

could speak the English language. (See pp. 294-5, 298, Vol. I, Trans.)

It is significant that the two participants in this conversation, Mr. Charles Sweeny and Mr. Lewis Clark, should have been found guilty of a similar fraud by this Court in the case of Kennedy Hanley vs. Charles Sweeny et al., a copy of the opinion of which is found at pp. 642-672, Vol. II, Trans, herein, and which is reported in 48 C. C. A., 612; and it is not more strange that Mr. Sweeny should have perpetrated another similar fraud upon Mr. A. B. Campbell, a co-owner in the O'Neill claim, lying east of and adjoining the Missing Link, one of the claims in controversy in this suit. (See pp. 541-5, Vol. II, Trans.) Mr. Campbell's testimony is not denied.

These matters are important, if not conclusive, as tending to prove the *quo animo*, and are always held to be admissible. In Hoxie vs. Home Ins. Co., 32 Conn., 37, the Court said: "Upon questions of *knowledge, good faith or intent*, any transaction from which any inference respecting the *quo animo* may be drawn are admissible."

In Jordan vs. Osgood, 109 Mass., 461, this language was used: "Contemporaneous frauds committed by the defendant are admissible if they tend to prove the motive or intention which actuated the defendant in the transaction under investigation."

In Butler vs. Watkins, 13 Wall., 464, Mr. Justice Strong

expressed the views of the Supreme Court of the United States upon this subject thus :

“In actions for fraud, large latitude is always given to the admission of evidence. If a motive exists prompting to a particular line of conduct and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another at about the same time and in relation to a like subject was actuated by the same spirit.”

The same Court had occasion to reaffirm that principle and carry it still further in its application in the case of *New York Mutual Life Ins. Co. vs. Armstrong*, 117 U. S., 591.

If the defendants are guilty of the acts charged in the bill, they are capable of denying everything pertaining to them, and if we adopt the standard suggested by the Circuit Judge that the greatest number of witnesses for or against a fact should determine its truth, the scoundrel who can call to his assistance his confederates outnumbering the defrauded party must walk from the court of justice unscathed and unwhipped, but if we measure this testimony by the standard of probabilities, if we apply to it the tests that honest men apply to determining human events of every day occurrence we must be led irresistibly to the conclusion that the testimony of Mr. Patrick Clark outweighs the testimony of all that is said in contradiction of him. It may be said that Mr. MacDonald is not worthy of belief; that the Circuit Judge so found. Upon what theory the Circuit Judge was warranted in concluding that Mr. MacDonald was unworthy of belief will appear from the opinion,

and it is briefly this: That he was a *willing* witness, that he stated time and place of conversations, and that he betrayed the confidences of his employer, and that he could not have pointed out to Mr. Sweeny the course of drill hole No. 2 because there had been no surveys made. Whether his testimony warrants any of those conclusions and whether that is the test of honesty, we leave to be determined by this Court.

It is not shown that he was interested in the case, that he bears any love for Mr. Patrick Clark or any hatred for any of the defendants, that he is to receive any reward or in any manner profit by the result of this litigation. Under such circumstances, to conclude that he would lie simply for the sake of lying is a monstrous conclusion. True, several of the witnesses connected with the diamond drill gang have testified that they never saw Mr. MacDonald in the mine when the drilling was being done, but the same witnesses testify that they never saw Mr. Sweeny in the mine either. Mr. MacDonald might have been in the mine and these witnesses not have seen him, or they may have forgotten the circumstance. It was certainly not a matter concerning which a workman would especially charge his memory. There was, however, a workman named Butler, a helper on one of the drill shifts, with whom Mr. MacDonald might have had innumerable conversations. The defendants did not call this witness. (See p. 806, Vol. II, Trans.) He was their employe, and the fact that they called all the rest save this one is a circumstance which we think militates against them. Mr. Culbertson testified that

Mr. MacDonald was in the mine several times. (See p. 220, Vol. I, Trans.) Mr. MacDonald testified that the ore was struck in drill hole No. 2 at night, but Mr. N. H. Wright, in charge of the work, testified that it was at 10 A. M., that he wrote down the date. The foreman of the shift, Mr. S. G. Knight, did not remember either the day or whether night or day. (See p. 806, Vol. II, Trans.) Mr. MacDonald did not write it down, and he may be mistaken, or the strike may have been made in the morning and he not have gotten the word until night and concluded that the two were coincident. But in no event was the time of the strike material. We have endeavored to avoid contradictions on immaterial matters.

Mr. Sweeny testified that Mr. MacDonald was unworthy of belief, and yet we find that according to Mr. Sweeny's own statements, he bought the Tiger and Poorman mines and paid the sum of \$250,000.00 therefor upon the *oral report made to him of those mines by this same Mr. MacDonald*. See p. 837, Vol. III, Trans., where Mr. Sweeny testified:

"A. Joe MacDonald. He said he had an option on it and "told me about it; *told me the facts about the mine, etc., and "the price that his option was, about 35 cents, I think, if I am "not mistaken. However, I didn't do anything with it and "we thought over the matter a while and finally I sent for Mr. "Culbertson. Mr. Culbertson came into the office and I asked "him what they would take for their stock, about 600,000 "shares. He told me 25 cents a share, I think. That was the "price he and the old man had agreed upon. I told him to go "and get the 600,000 shares and bring it over and I will give "him a check for it."*

He then testified in the same connection that he had no report upon the property from anybody else. (See p. 837, Vol. III, Trans.) Evidently Mr. Sweeny put great reliance, not only in the judgment of Mr. MacDonald, but in his veracity, and as to whether or not both were warranted, Mr. Sweeny's annual report (see complainants' Exhibit 17, p. 1165, Vol. IV, Trans.) will answer. Mr. Sweeny testified that Mr. Joseph MacDonald was not in the employ of the defendant companies at any time in any capacity, but in another suit pending in the Circuit Court in the District of Idaho, entitled John F. Forbis vs. Buffalo Hump Mining Co., being one of the defendants herein, it was found convenient by the Buffalo Hump Company to prove that Mr. MacDonald was their *consulting engineer* at the times he stated in his deposition in this case that he occupied that position. See pp. 948 to 968, Vol. III, inclusive of the Transcript, where it will be seen that upon a cross-examination of Mr. MacDonald, facts, tending to show that he was in the employ of the Buffalo Hump Company as consulting engineer, were elicited from him by the then counsel of the Buffalo Hump Company. Mr. MacDonald testified that a sum of money had been paid to him as *the purchase price of a bond* that he had upon the property. The Buffalo Hump Company immediately set about to show by its cross-examination, and Mr. MacDonald admitted, that the money was paid him partially for that, *but largely for his services as consulting engineer*. Mr. MacDonald's testimony, assuming that only half of it is true, convicts both Mr. Sweeny and Mr. Culbertson

of deliberately planning the fraud charged in the bill. It is conclusive on the question of intent and corroborates Mr. Patrick Clark with reference to the false representations. It corroborates and is consistent with the testimony of all our witnesses. It was therefore of the greatest importance that he should in some way be discredited.

Mr. Culbertson admits that Mr. MacDonald was not an infrequent visitor to the mines, having been through them three times between July, 1899, and January, 1900; that he was in the mine at the time Mr. Thomas Jay, as foreman, was engaged in running the crosscut; that, on another occasion, Mr. Culbertson took him through the mill and they spent the evening in the Company's office in social conversation. (See p. 221, Vol. I, Trans.) Mr. MacDonald has testified, and it is not denied, that he is the Superintendent of the Alaska Treadwell Gold Mining Company, the Alaska Mexican Gold Mining Company, the Alaska United Gold Mining Company, and the Alaska Juneau Gold Mining Company, operating mines on Douglas Island and on the mainland in Alaska, these properties constituting what is commonly known as the "Treadwell Mines" (See p. 283, Vol. I, Trans.) From this, it is not an extravagant statement, we think, to say that he is occupying one of the highest positions in the world connected with active mine management, a position of trust and high responsibility. The Treadwell Mines are probably recognized as one of the largest gold mining propositions in the world. There is nothing in the records to establish this latter proposition, but it is.

we think, a matter that is within the knowledge of every one. We think it so preposterous to assume that a man occupying such a high position would wilfully step down from that lofty pedestal to the base and ignoble position of a common criminal and commit willful perjury, prompted by neither love, hatred, ambition nor reward, that the mere statement of the proposition is a sufficient refutation of it, and when we consider that the only persons who contradict him are Mr. Sweeny and Mr. Culbertson, one of whom we have shown to have been guilty of the same sort of conduct heretofore, and both of whom we feel are so everlastingly impeached by the record which defendants have themselves made, that no further argument or comment upon the proposition is necessary.

In addition to these unreasonable circumstances and conditions surrounding this transaction, in addition to the impeachment made of Mr. F. Lewis Clark and Mr. Charles Sweeny by their having been convicted of a similar fraud heretofore by this Court, in addition to the circumstance of Mr. Sweeny having committed a fraud upon a co-owner, Mr. A. B. Campbell, for the O'Neil claim, and in addition to the testimony of Mr. Joseph MacDonald *fastening* upon Mr. Sweeny a direct and willful purpose to defraud, as further testimony to show whether Mr. Sweeny is entitled to any credit at all or not, we have him contradicted by the direct testimony of Mr. Albert Allen, who testified that Mr. Sweeny told him he had made a big strike in the east end of the Poorman mine (Poorman adjoins the Ella on the west). going into detail as to the size and

importance of the strike, showing conclusively that he was referring to the strike in the crosscut, and by Mr. Jacob N. Rice and Mr. James N. Justus, who both testified that he described the ore bodies in the crosscut and told them of the magnificent body of ore found, and stated to them that they were of great value. Mr. Sweeny denies each and all of these conversations and everything that occurred at them. He does not admit having conversations upon the subjects testified to by these three witnesses, but he denied the subject matter in toto. We find Mr. Sweeny contradicted again by his own affidavit, a copy of which is in evidence in this case (see p. 884, Vol. III, Trans.), where he states:

“That the said MacDonald, during the year 1899, sought “to enter the employment of the companies represented by this “affiant. And this affiant *did consider the propriety of making an arrangement with the said MacDonald for entering “the employment of the said companies*, but because of certain “statements made by the said MacDonald which came to the “knowledge of this affiant, this affiant concluded that the said “MacDonald was not reliable in business transactions, and could “not be believed, either in the ordinary course of business, or “under oath, and therefore broke off all negotiations with the “said MacDonald looking towards his employment by any “companies represented by this affiant.”

At page 851, Vol. III, Trans., we find Mr. Sweeny testifying as follows:

“No, sir, Joseph MacDonald has always been antagonistic “to us. He has appeared as a witness, as a professional witness, against us in nearly every case we have had, and *under*

"no circumstances would we ever employ him, in any confidential position."

It is possible, of course, that complainants have founded this suit upon a complete fabrication of the facts. We say it is *possible*, because the vagaries of the human heart are as uncertain as the shifting of the winds, but if such were the case, there would be some suspicious circumstance rise up somewhere to tell the tale, some unreasonable or inconsistent fact that would refuse to dovetail with the remainder, instead of which we see all these irreconcilable, inconsistent and unreasonable situations surrounding the defendants. It is true that the complainant, Mr. Patrick Clark, is an interested party, but he is only interested in recovering back that which was unlawfully taken from him. Mr. Sweeny is interested not only as a party (he testified at p. 919, Vol. III, Trans., that he owned one-fifth of the stock in the defendant companies), but he is interested over and beyond that—his reputation, his honor are both involved.

Mr. Culbertson, also testified, as before stated, that he never made any representations to Mr. Patrick Clark of any kind. It is charged in the bill, and the testimony of Mr. Patrick Clark is to the effect, that Mr. Culbertson was deeded his interest in the "Ella" and "Missing Link" in consideration of his keeping complainants advised of development at depth in the adjoining properties, of which he was the General Manager at the time of the bargain. The Circuit Judge found this to be an unlawful bargain, and one that complainants could not expect to have

enforced or performed. It will be observed that the agreement with Mr. Culbertson was not to betray the secrets of his employer, but we quote from a portion of paragraph 6 of the bill of complaint, which is supported by the testimony of Mr. Patrick Clark: "And in the event that in the workings of the " 'Poorman' mine any ore body should be struck, so near the " 'Ella' line as to be probable that the same extended into and "through the 'Ella,' an interest in which was so conveyed to the "said Culbertson, that he should advise your orators of that "fact."

With reference to this agreement, the Circuit Judge says: "That he was a co-tenant with complainants gave him no right "to communicate to them the business of his employers in the "properties."

What is there unlawful in this agreement? Is a mining company authorized to conduct its operations in a secret and clandestine manner in the interest only of the management and the majority of the stockholders? Are the workings, because they are underground and sheltered from the protection of inquiring eyes, any more sacred than if they were on the surface where any one could see them that wanted to? Is the size and value of an ore body being worked by a mining company at depth in which a large number of stockholders are interested a secret that is the sacred property of the management? If so, a powerful weapon is put into the hands of a few men connected with the management of a mine to defraud the public generally, and to defraud adjoining owners out of

their interests. Mr. Culbertson takes a "double-hitch" at us upon this proposition. First, he says he never made such an agreement, but admits an "understanding" (see pp. 175, 240, Vol. I, Trans.); and second, if he did make it, it was void. Let us see first whether he made it. What was he given his interest for? We invite the Court's attention to a careful examination of his testimony from page 170 to page 176, Vol. I, Trans. He testified that it was to assist in putting through the old Poorman-Tiger deal, and yet it is shown by his examination at page 173, Vol. I, Trans., that neither Mr. James Clark nor Mr. James P. Harvey, two of the complainants in this case, had any interest in effecting the consolidation referred to, nor had they any stock in the Tiger or Poorman mines, and yet he contends that the interests of these two complainants was given equally with Mr. Patrick Clark's and Mr. Benjamin C. Kingsbury's, to effect that consolidation. It is further shown by his cross-examination that by the consolidation he, Mr. Culbertson, received a large block of stock, that he received a salary of \$500.00 per month (a raise of \$300 above the amount received by him from the Tiger Company prior to that time (see pp. 236-7, Vol. I, Trans.) as General Manager of the consolidated companies, and that he received a large block of stock in the mercantile company that supplied the consolidated companies with stores and merchandise. The fact is, from his own evidence, it will be shown that Mr. Culbertson was the man who profited more than anybody by the consolidation, and yet he insists that the one-fifth interest in

the "Ella" and "Missing Link" was given him as a consideration for effecting that consolidation. If Mr. Culbertson's version is true, if he did not receive this one-fifth interest in the "Ella" and "Missing Link" for advice to be furnished to complainants thereafter, then he was under no obligation to reveal to his co-tenants anything concerning the development of the "Ella" and "Missing Link," unless he became an intending purchaser. He could have sold his interest for any price he saw fit, and unless his co-tenants inquired of him the facts, he was under no obligation to disclose his knowledge; but mark how scrupulously honest he becomes all at once, suggesting that he feels himself bound by some sort of a compact to his co-owners other than that created by law. At page 257, Vol. I, Trans., he testifies that he refused to accept a greater price for his interest than the complainants in this case got for theirs. We quote his exact language: "A. I was placed in a peculiar position. I had told Mr. Sweeny that I would not sell my interest in that property unless Mr. Clark sold his, and that I would be perfectly willing to take whatever Mr. Clark took for his property; and I wrote to Mr. Clark that I thought we could sell the property to Mr. Sweeny."

And on the same page: "I supposed Mr. Clark would confer with me."

"Q. Would you have told him of the condition had he done so?"

"A. I should probably have told Mr. Clark *what the property was worth.*

“Q. Would you have told him of the drill hole that was “run in the east end of the property?”

“A. If he had asked me to, I should have.

“Q. How did you expect him to ask, when nobody knew “about it except yourself and the managers of the property?”

“A. Why, everybody knew the diamond drilling was going “on there.”

And at page 244, Vol. I, Trans., he says :

“A. Mr. Clark hardly ever had much to say. He asked me “*how the Poorman ore was coming along.*

“Q. Did you tell him.

“A. Yes, I talked pretty freely.”

Here is a *voluntary* performance by Mr. Culbertson of the very agreement that Mr. Patrick Clark testified that he made with him. This is a powerful circumstance in favor of the statements of Mr. Patrick Clark upon the question of that agreement. Mr. Culbertson at that time evidently recognized his duty under the contract, nor did he consider it unlawful or a betrayal of his employer’s *secrets so long as nothing was found of value*. But when a discovery was made, *not within the property of his employer, but within the property of his co-tenants, made by his employer unlawfully*, in which unlawful matter he was a participant, then, according to the holding of the Circuit Judge, he was exonerated from the performance of his agreement because it was unlawful, and evidently the Circuit Judge exonerated him from the performance of the duty imposed upon him by law to his co-tenants.

Mr. Culbertson then testifies that he received one thousand dollars, and no more, for his interest.

When we take into consideration with all these circumstances the fact that Mr. Culbertson's deed to the Buffalo Hump Company contained upon it \$11.00 in United States revenue stamps duly cancelled, placed there before record (see complainants' Exhibit 17, pp. ¹¹⁰⁵ ~~1162-3~~, Vol. IV, Trans.), we have some powerful circumstances creating considerable suspicion, to say the least, as to just what Mr. Culbertson's attitude in this matter was.

That one tenant in common dealing with another concerning the estate is required to disclose all material facts within his knowledge concerning the value, development and condition of the property, and that the suppression of any fact pertaining to any of those matters is a fraud upon his co-tenants is in law a proposition that admits of no exception, nor do we feel called upon to cite authorities in support of a proposition so thoroughly elementary. Mr. Sweeny, well knowing that Mr. Culbertson was a tenant in common with the complainants, as early as the month of June made an arrangement with Mr. Culbertson on behalf of the Buffalo Hump Company "to get some opportunity to talk with Clark (meaning Mr. Patrick Clark) with reference to his interest." (See p. 274, Vol. I, Trans.) With those instructions from Mr. Sweeny, it is reasonable and probable and quite consistent that Mr. Culbertson called on Mr. Patrick Clark at his office and had the conversation that Mr. Patrick Clark testified occurred between them.

Mr. Culbertson admits having had a conversation during the summer of 1899 with Mr. Patrick Clark. (See pp. 253-4, Vol. I, Trans.) He says he only had one in all that summer, but he says the date of it was June 20th. He is sure of the date. We then show by Mr. Patrick Clark, and we put in evidence some hotel registers to corroborate him in that regard (see pp. 983-6, Vol. III, Trans.), that he was not on the Pacific Coast at the time that conversation occurred, nor for several weeks before, nor for several after. Therefore, it is quite probable that the conversation occurred after his return in the month of August, as Mr. Patrick Clark testifies it did. Mr. Culbertson does not pretend that at the conversation he disclosed to Mr. Patrick Clark any of the discoveries made upon the "Ella." He testifies at pages 243-4, Vol. I, Trans., that he had, early in 1899, advised Mr. Clark of the fact that a drift had been run through the "Ella" and no ore had been found, and in this connection he testified that Mr. Clark never had much to say, but that he talked pretty freely with him. At the conversation which Mr. Culbertson admits that he had after Mr. Sweeny had authorized him to "see Mr. Clark with reference to his "interest," he admits that he did not talk freely; on the other hand, he admits that he made no disclosures of the condition of the property. In other words, he admits that he talked freely with Mr. Patrick Clark about the condition of the property before anything was found on it, but after a big strike was made and he was sent by Mr. Sweeny to purchase it, he suppressed all facts, thus leaving the impression at least that

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That one tenant in common dealing with another concerning the estate is required to disclose all material facts within his knowledge concerning the value, development and condition of the property, and that the suppression of any fact pertaining to any of those matters is a fraud upon his co-tenants is in law a proposition that admits of no exception, nor do we feel called upon to cite authorities in support of a proposition so thoroughly elementary. Mr. Sweeny, well knowing that Mr. Culbertson was a tenant in common with the complainants, as early as the month of June made an arrangement with Mr. Culbertson on behalf of the Buffalo Hump Company "to get some opportunity to talk with Clark (meaning Mr. Patrick Clark) with reference to his interest." (See p. 274, Vol. I, Trans.) With those instructions from Mr. Sweeny, it is reasonable and probable and quite consistent that Mr. Culbertson called on Mr. Patrick Clark at his office and had the conversation that Mr. Patrick Clark testified occurred between them.

Mr. Culbertson admits having had a conversation during the summer of 1899 with Mr. Patrick Clark. (See pp. 253-4, Vol. I, Trans.) He says he only had one in all that summer, but he says the date of it was June 20th. He is sure of the date. We then show by Mr. Patrick Clark, and we put in evidence some hotel registers to corroborate him in that regard (see pp. 983-6, Vol. III, Trans.), that he was not on the Pacific Coast at the time that conversation occurred, nor for several weeks before, nor for several after. Therefore, it is quite probable that the conversation occurred after his return in the month of August, as Mr. Patrick Clark testifies it did. Mr. Culbertson does not pretend that at the conversation he disclosed to Mr. Patrick Clark any of the discoveries made upon the "Ella." He testifies at pages 243-4, Vol. I, Trans., that he had, early in 1899, advised Mr. Clark of the fact that a drift had been run through the "Ella" and no ore had been found, and in this connection he testified that Mr. Clark never had much to say, but that he talked pretty freely with him. At the conversation which Mr. Culbertson admits that he had after Mr. Sweeny had authorized him to "see Mr. Clark with reference to his "interest," he admits that he did not talk freely; on the other hand, he admits that he made no disclosures of the condition of the property. In other words, he admits that he talked freely with Mr. Patrick Clark about the condition of the property before anything was found on it, but after a big strike was made and he was sent by Mr. Sweeny to purchase it, he suppressed all facts, thus leaving the impression at least that

no change had occurred in the condition of the property affecting its value. This is equivalent to a false statement. See *Stewart vs. Ranch Co.*, 128 U. S., 388. Mr. Culbertson's explanation on surrebuttal of this conversation, in which he abandons the cocksureness which characterized it in the first instance is quite characteristic of his entire testimony. He testified that he wrote Mr. Clark a letter on the 25th of August (the ore was struck in the drill hole disclosing 16 feet of ore on the 13th of August—see p. 208, Vol. I, Trans.). In that letter, evidently still obeying the instructions of his superior officer, Mr. Sweeny, "to get some opportunity to see Mr. Clark "with reference to his interest," and which letter Mr. Culbertson expressly testifies was *to put Mr. Patrick Clark upon his guard* (see p. 256, Vol. I, Trans.), no mention was ever made of the strike in the drill hole, nor of the fact that the Buffalo Hump Company was trespassing upon and prospecting complainants' ground. When that letter was written, Mr. Culbertson was a tenant in common with the complainants. That was known to Mr. Sweeny, the General Manager of the defendant companies, because both Mr. Sweeny and Mr. Culbertson testified that Mr. Sweeny had exacted a promise from Mr. Culbertson to sell his interest in the "Ella" and "Missing Link" to the Buffalo Hump Company for the same price that the complainants sold theirs. (See p. 190, Vol. I, Trans.) But Mr. Culbertson attempted to show, as contradicting the testimony of Mr. Patrick Clark, to the effect that he had delivered to him (Mr. Culbertson) a deed from Mr. James Clark about the 22d, 23d or 24th of August, that the deed from Mr. James

Clark and wife to him (Culbertson) was dated at a later period, and that some correspondence passed between Mr. Culbertson and Mr. Charles S. Eltinge, who at that time was Mr. Patrick Clark's private secretary, concerning that deed, and that the letter from Mr. Culbertson dated the 25th of August to Mr. Patrick Clark was also a contradiction of Mr. Clark in that regard.

It should be noted that Mr. Patrick Clark did not fix the date positively on which he gave Mr. Culbertson the deed from Mr. James Clark. He said, at page 481, Vol. II, Trans., that it was obtained "about the 24th or 25th of August." On cross-examination, at page 992, Vol. III, Trans., he said:

"A. That was later. I handed to Mr. Culbertson along about "the 22d, 23d or 24th of August, somewhere along there
 "* * *"

The bill (p. 9, Vol. I, Trans., Par. VIII) simply states that it occurred in August, 1899.

A careful examination of the evidence of Mr. Eltinge will show that he wrote no letter pertaining to the matter *by authority of Mr. Patrick Clark, nor as his secretary.* (The only letter which Mr. Culbertson claims to have received from Mr. Eltinge does not acknowledge receipt of any letter from Mr. Culbertson, nor purport to be in reply to any letter. See page 782, Vol. II, Trans.). That the only letter he did write was at the instance of Mr. James Clark without the knowledge of Mr. Patrick Clark (see p. 975, Vol. III, Trans.); that he never received the letters which Mr. Culbertson testifies that he wrote

to Mr. Patrick Clark; and Mr. Patrick Clark also testifies that he never received the letter of August 25th, nor any other letters upon the subject from Mr. Culbertson. What conversations or correspondence passed between Mr. James Clark and Mr. Culbertson after the conversation between Mr. Patrick Clark and Mr. Culbertson, and whether or not Mr. Culbertson sent back the deed to Mr. James Clark, which Mr. Patrick Clark gave him in August at Spokane, for correction or otherwise, or to have the name of Charlotte Clark, his wife, inserted, or for any other cause, we do not know, but when we consider the fact that Mr. James Clark's lips are sealed in death (his administrator prosecuting this suit), and that Mr. Culbertson knows that he cannot contradict him, nor give any explanation of the matter; that Mr. Eltinge, a disinterested party, should not have received any of the letters Mr. Culbertson says he wrote; and that Mr. Patrick Clark never received any of the letters, Mr. Culbertson's story is again surrounded with that same suspicion which has characterized it from the beginning.

As before shown, Mr. Patrick Clark testified that Mr. Culbertson stated to him: "Do you know that your brother *never gave me* that one-twentieth interest in the 'Ella' " (see p. 479. Vol. II, Trans.), and that he thereupon procured the deed from his brother, James Clark, and delivered it to Mr. Culbertson on the 22d, 23d or 24th of August. The deed put in evidence from James and Charlotte Clark to F. R. Culbertson bears date of the 25th of August and was acknowledged

on the 7th of September. (See p. 1135, Vol. IV, Trans.) We call special attention to the following clause in that deed:

“This deed is executed and delivered in lieu of a former deed between the same parties and for the same interest in said claims, which said deed has been lost or destroyed.”

Mr. Culbertson, in the conversation with Mr. Patrick Clark, did not contend that his deed had been lost or destroyed. He stated that it had never been executed. Is this not consistent with the testimony of Mr. Patrick Clark, and a powerful circumstance in favor of its truth that he did give Mr. Culbertson a deed? Is it not consistent with our theory that thereafter some transaction occurred between Mr. Culbertson and Mr. James Clark, deceased, of which no one has any knowledge except Mr. Culbertson? Is it not consistent with the theory that Mr. Culbertson lost or was dissatisfied with the deed from Mr. James Clark that was given to him by Mr. Patrick Clark in August, and that he applied straight to Mr. James Clark for another deed?

The letter of August 25th which he says he wrote to Mr. Patrick Clark for the “purpose of putting him on his guard,” and incidentally asking for the deed from Mr. James Clark requires a little explanation from Mr. Culbertson. It is in evidence that Mr. Culbertson came from Burke to Spokane on the 20th of August; that he remained in Spokane until Thursday, the morning of the 24th of August. (See testimony of James Webb at pp. 969-74, Vol. III, Trans.) It is also in evidence that Mr. Sweeny arrived in Spokane from California on

the same day, August 20th, and that he left Spokane with Mr. Culbertson, Mr. Packard, President of both defendant companies, and other officers of the defendant companies on the 24th of August. (See Mr. Sweeny's cross-examination at p. 881, Vol. III, Trans.) They would, of course, arrive in Burke on the afternoon of that day. Mr. Culbertson testified in his second cross-examination taken in Spokane (see p. 790, Vol. II, Trans.) that while in Spokane he had usually little or nothing to do, but that when he was at the mine, he was required to work 15 hours a day, and that he had a stenographer to assist him, and yet we have him in Spokane on the 20th, 21st, 22d, 23d and morning of the 24th of August, and Mr. Patrick Clark also in Spokane at that time. Mr. Culbertson had this important knowledge that he wanted to impart long before coming to Spokane on the 20th, and yet he travelled from Spokane a distance of 140 miles to Burke for the purpose of writing back to Mr. Clark this important information which he says he wanted to give him for the purpose of putting him on his guard. He could have given it to him at Spokane when he had so much leisure, either by telephone or by writing him a note, instead of which he stole sufficient time at the mine, where he says he was required to work 15 hours a day, to write an autograph letter containing two and a half full pages of foolscap, which certainly required an hour's time to write, and that too on the day of the arrival at Burke, when he had the President and General Manager of both companies present with him. If he was required to work 15 hours per day ordin-

arily, on the day when the President and General Manager of the companies were there, he would still have additional duties to perform. He would doubtless be required to entertain them, to report to them, to advise them of the condition of the properties, and yet he found sufficient time after travelling from Spokane to Burke to write that long letter in his own hand. Why didn't he dictate it to his stenographer? If he wrote the letter at all, why didn't he give Mr. Patrick Clark all the facts? Why did he say to him, "I think Sweeny will buy," and stop there? If he was honest in the matter, if he was not making a record for future use, why didn't he give Mr. Clark this information before he left Spokane? Strange, indeed, that he should have written such a letter at such a time with the President and General Manager of the defendant companies at his side. Strange that it should follow so quickly upon the heels of the strike of 16 feet of ore on the east end of the "Ella," and *immediately* upon Mr. Sweeny's first visit to the mine after the strike in drill hole No. 2. Why didn't Mr. Patrick Clark receive the letter? Is it possible that he would deny the receipt of such a letter? There is certainly not enough in it that is damaging to our side of the case to warrant Mr. Patrick Clark committing perjury concerning its receipt. If we would commit perjury it seems to us that he could have done so more profitably in other directions. We call the Court's attention to Mr. Culbertson's explanation of writing that letter and keeping a copy of it when he testified at San Francisco (see pp. 246-50, Vol. I, Trans.). It is very amusing when taken in connection with

the subsequent explanation he attempted to make when he was examined the second time at Spokane.

That letter, assuming it to have been written, is conclusive of the dishonesty and fraudulent purpose of Mr. Culbertson, not because of what is said in it, but being addressed to a co-tenant and the subject of it pertaining to the estate in which they are both interested, being for the purpose of putting a co-tenant upon his guard, the suppression of material facts is in law and morals fully as reprehensible as a statement of falsehood. The ore had been struck. Mr. Culbertson knew of it, and made absolutely no mention of it.

And we respectfully ask the Courts' attention to pp. 775-8, Vol. II, Trans., containing what occurred when the letter was put in evidence and we demanded an examination of the book. We were denied an examination of the book. We then asked permission to look at the index to see if it had an index and we were denied that. Mr. Culbertson and Mr. Sweeny denied everything that is testified to by Mr. Joseph MacDonald, and herein again we see concerted action in throwing their combined force upon every place that we attach them. They deny everything carefully along the same lines.

The Circuit Judge criticised the testimony of Mr. Joseph MacDonald because he is a "willing" witness, because "he is prudently cautious in fixing the time and place when the many important conversations occurred at which he testifies." It does not appear that he was sufficiently "willing" to testify in

this case to come voluntarily within the jurisdiction of the Court, but on the other hand we were required to travel about 1200 miles and serve the usual notices and take his testimony in the ordinary way, to secure his testimony. It does not impress us that he did so, but suppose he did state *time and place* of conversations and *persons present*, is that a badge of dishonesty? Mr. F. Lewis Clark went considerably further in his testimony; he not only testified to *time and place and persons present*, but he remembered the *particular place in the room where each of the parties sat*, and this is, too, more than two years after the occurrence, and yet the Circuit Judge fails to apply the rule to him, apparently passing unnoticed those matters in the testimony of Mr. F. Lewis Clark.

Whether the criticism of the testimony of Mr. Patrick Clark by the Circuit Judge with reference to his being refused admission to the Tiger and Poorman mines *about eight months after the sale to the defendants*, is warranted by the record we leave to be determined by this Court. It seems to us that a careful reading of that testimony, wholly immaterial in every particular, occurring long after the events at a time when Mr. Patrick Clark was beginning to suspect that defendants were trespassing on the Poorman extension claims, shows rather a disposition on his part to understate than to overstate the facts, and no disposition at all to argue the facts with counsel for the defendants; in striking contrast with the testimony of Mr. Sweeny that is characterized throughout by insolence, brag, defiance, indifference to the rights of others and a general air of

arrogant superiority predicated upon we know not what, a good illustration of which is contained on pp., beginning the latter part of 911, 912, 913-and 914. Mr. Sweeny's testimony, Vol. III, Trans.; also Comp.'s Ex. No. 38 A, p. 1263, Vol. ~~III~~^{II}, contrasting equally favorable with the voluble, argumentative and evasive character of Mr. Culbertson's testimony. And yet the Circuit Judge seems to make this immaterial piece of testimony the turning point of credibility between the parties, applying a rule to us that was not applied to the other side.

The irreconcilable conflict of defendants' evidence, the overwhelming contradiction which was made of the testimony of their principal witnesses as detailed herein, were all passed over and apparently forgiven by the Circuit Judge, while the slightest pretext is apparently seized upon to discredit the testimony on the part of complainants. We think it apparent that the Circuit Judge wholly misconceived the evidence on both sides and wholly misunderstood the entire case.

What would be the natural conduct of an honest man who was wrongfully charged with fraud? Would he run away from his accusers? Would he adopt the dilatory tactics of the charlatan and dissembler to delay the hearing, to annoy and harass his accusers and make it expensive for them to present the facts against him? Would he entrench himself behind the fact that the burden of proof was on his accusers and that he would outnumber him in his witnesses for or against a given fact, basing all and everything upon "You can't prove it?" No, an honest

man would hasten the time, make the place and seek the opportunity, that he might purge himself of the unjust and false accusation against him. But how stands this case?

The bad faith of the defendants in this case is apparent at every stage and when it is considered that the principal actors and the principal witnesses on the part of the defendants. Mr. Sweeny and Mr. Culbertson, were the General Manager and Assistant General Manager of the defendants, at the time it is charged the fraud was committed, and at all times since, these matters become important.

Mr. Chief Justice Waite announced a principle in *Crosby v. Buchanan*, 23 Wall, 457, aptly pertinent to this matter. An examination of the case will show that the defendant who was charged with fraud, and concealed certain matters from the Court, had acted in bad faith in the management of his cause, had offered proof of only a small part of the facts, and had suppressed and concealed others. The Court said:

“He does not excuse himself from this attempted fraud by pleading defect of memory, but claims boldly that he was not required to tell all he knew; that his duty was at an end when, selecting his own facts, he presented his own case. It is true he had a right to select that way of coming into Court, but having deliberately made his selection he ought not to be surprised if he finds that he is received with suspicion. Honesty of purpose prompts frankness of statement. *Concealment is indicative of fraud.*”

Here are—at least, we so charge—the two arch-conspirators, one the General Manager of both defendant companies, the

other his assistant, both reside at Spokane, both under the control of the defendant companies, and yet when it comes to take their testimony one goes to New York and we are invited to go there and take his testimony. Having gone there at a great expense, we are invited to come home. The other goes in the opposite direction to San Francisco and we are invited to go there and take his testimony at a great expense. We do so, and yet only a part of his testimony is taken and he afterwards finds it quite convenient to rendezvous at Spokane with his other conspirator upon the conclusion of the trial. They are unable to go to Alaska to take the testimony of Mr. Joseph MacDonald. We offered them an extension of time, but they rejected all overtures. After the deposition was taken, we gave them a copy and again requested them to cross-examine, which they refused. Then, after the time in which to take testimony had expired and they saw no other alternative, in the middle of winter, we are given a short notice—about five days—to go from Spokane to Treadwell, Alaska, and appear at the cross-examination of Mr. Joseph MacDonald. Having adopted every weapon in their power to prevent the taking of the testimony of Mr. MacDonald, and the cross-examination having if anything strengthened the testimony in favor of complainants, with no other weapon left at their command, they then charge him with having lied, as being a prejudiced and biased witness. Does this show that we proffered to the Court the testimony of a dishonest witness? Does it not have a greater tendency to show that the other side knew what his testimony

was going to be and that they adopted all the tricks and artifices at their command to prevent us from getting the testimony? If they did not know that there was lodged in the breast of Mr. MacDonald testimony that was damaging to them, why did they adopt all this questionable practice—and we say this with no disrespect to counsel—to prevent us from getting that testimony? These are matters that in equity arouse suspicion and are, to say the very least, badges of guilt.

The Circuit Judge held that, while Mr. Sweeny was contradicted by Messrs. Allen, Justus and Rice, these contradictions were upon immaterial matters and therefore not to be considered by him in determining the weight to be attached to, and the credibility of, Mr. Sweeny's testimony. An examination of the transcript will show that one of the vital issues of the case, one that we bent every energy to maintain, and in doing which we labored under many difficulties, was the size of the ore body on the 1200 through the Ella and Missing Link; that it was worth a large sum of money, *to the knowledge of Mr. Sweeny*, and that Mr. Sweeny had stated to Mr. Clark *that it had no value as a mineral claim*. The bill alleges that the property had great value at the time we sold, to-wit, more than \$500,000.00, which was known to the defendants. The answer denies this and charges that we were paid the full value, and defendants' evidence tended in the same direction. Therefore, Mr. Sweeny's statements to Messrs. Allen, Justus and Rice as to the value and size of those ore bodies became of the greatest importance. It was not a question as to whether the statements made to

these parties were in all respects true, but it was the opinion entertained by Mr. Sweeny as to the size and value of those ore bodies.

If the Court finds that Mr. Patrick Clark's version of the facts is true; that is to say, that Mr. Sweeny stated to him as follows: (See p. 482, Vol. II, Trans.)

"A. Around the Poorman. I asked him what interests he referred to and he named the 'Sheridan,' 'Ella' and 'Missing Link.' I asked him how he owned in the 'Ella.' He said 'he had bought Mr. Culbertson's interest in the 'Ella' and 'Missing Link.'"

Then the Court of course must conclude that in equity *for the purposes of that transaction*, Mr. Sweeny was, or the companies that he represented were, *tenants in common* with the complainants and they were entitled to proceed upon the theory that he would, and that he did, as the law required he should. *disclose all the facts with reference to the condition and value of the property.* Mr. Sweeny at that time knew that his emissary, Mr. Culbertson, who was a tenant in common with the complainants, had interviewed Mr. Patrick Clark and had written him a letter upon the subject of the sale. Therefore, we earnestly urge that from any standpoint the deal was made between tenants in common, and the duty was imposed upon such purchasing tenant to disclose all the facts.

II. Was the Work of Prospecting Complainants' Ground Done Clandestinely and With the View of Taking Advantage of Complainants?

The Circuit Judge, in his opinion, used these expressions:

1. "While no precedents have been cited, yet were I convinced that this work had been done clandestinely and with a view of taking advantage of complainants, I should hold that a purchase without a communication of all the facts to the seller should be rescinded."

At another place in the opinion, the Circuit Judge used this language:

2. "It also appears that the 1200 foot level marked 'abandoned drift' was run in the spring of 1899 and before defendants had purchased. While there is no evidence of authority for, or objection to, what defendants have done, it seems that since the time of Clark's management, workings have been extended into this ground without question and acquiesced in, and it may have been because the old company owned the ground on both ends of the 'Ella.' Sweeny says they found the works there and used them without knowing of any objection. Under such circumstances it cannot be concluded that such possession was clandestine or for the purpose of defrauding the 'Ella' owners."

At another place in the opinion is the following:

3. "He (referring to the witness, Mr. Joseph MacDonald,) says he pointed out on the map to Sweeny this drill hole and showed him that it was in the 'Ella' ground, to which it was answered that he could not do so, because no survey had been made connecting these underground workings with the surface lines, which is confirmed by several witnesses, including one of the complainants."

And again he announced this rule of law :

4. "Any conduct, whether it be of silence or of words, intended to convey the wrong impression to the other party and to deceive him, and which has such effect, comes within the rule of fraudulent representations and is actionable," citing the pertinent and well considered case of *Loehr v. Harris*, decided by the Circuit Court of Appeals of the Second Circuit, and reported in the 6th C. C. A., page 394.

How the Circuit Judge harmonized that rule of law with Mr. Sweeny's testimony and still found that he was not guilty of fraud, we do not understand. For instance, at page 844, Vol. III, Trans., Mr. Sweeny testified as follows :

"Q. He (Mr. Patrick Clark) says you told him the ground was not worth \$15 for the mineral, but that you wanted it for the reasons already stated. Did you tell him anything about the value of this ground?"

"A. There never was any question about the value in any way. Mr. Clark never asked me any questions about it and I never told him. *I think he thought, and I think justly thought, that he knew more about the property than I did. He had worked it a good many years. I don't think he thought I could tell him anything about it after having the property for two months.*"

Here is a plain admission by an intending purchaser who had acquired his knowledge of the property by *trespasses* and in an *unlawful manner*, that the man he was dealing with *was laboring under the false impression* that he knew more about the property than he (Mr. Sweeny) when as a matter of fact Mr. Sweeny knew all about the condition of the property and knew that the seller knew nothing about it.

With reference to the third (3rd) quotation, *supra*, from the opinion of the Circuit Judge, we think the record does not sustain the Circuit Judge. The testimony of one of the complainants referred to was evidently the testimony of Mr. Patrick Clark, at page 500, Vol. II, Trans.

“Q. Now you ran a tunnel on the 100 foot level. You ran “that I suppose?

“A. Yes, sir.

“Q. That ran into the ‘Ella’ ground?

“A. I don’t think it did in my time; perhaps it might, but “I don’t remember it.”

Again at page 496, Vol. II, Trans. :

“Q. From what level of the Poorman did you first run into the ‘Ella’ ground?

“A. The 600.”

Again at page 498. Vol. II, Trans. :

“Q. Did not connect your stopes with any *levels above*?

“A. No, not that I know of * * *

“Q. You think you did not connect the 6th and the 8th?

“A. I don’t remember having done so.”

This testimony shows that it had reference to *levels above*, and not *surface lines*. No other examination was made of any of complainants on this point. The Circuit Judge is in error in concluding that “No survey had been made connecting these “underground workings with the surface lines.” It is shown to have been done by defendants’ witnesses.

Mr. Miller, connected with the management of defendants, at page 715, Vol. II, Trans., testified as follows:

“A. Well, since the summer of 1899, when the Buffalo “Hump Mining Company took possession of the Tiger-Poor-man properties, I was at that time the consulting engineer for “the Buffalo Hump Mining Company. * * *”

“Q. Mr. Miller, you have heard Mr. Smith testify that he “got certain data from you on the question of maps while he “was on the stand this A. M. Will you state what that data “was, and as to the facts in regard to your giving it to him?”

“A. The principal portion of the maps which he has intro- “duced here were made from his own surveys of the live and ac- “cessible portions of the mine, both underground and on the sur- “face. Some of the old stopes which were not accessible he “took from *working maps left and in the possession of the Buf- “falo Hump Mining Company*, taken from the Tiger-Poorman mine.”

At pp. 716-8, Vol. II, Trans., the same witness:

“Q. State if he made them under your direction as you have “said, from this data.

“A. They were principally made under my direction, yes, “sir; in connection of course with the management of the mine,

“Q. State if you were consulted by him and directed him, “in the making or use of the data which you gave him,

“A. In general, yes, sir.

“Q. Now, Mr. Miller, you may state whether or not that “data represented any surveys that were made to your knowl- “edge of the 600, or other workings, above the 800 foot level.

“A. To a certain extent, yes.

“Q. State to what extent; state the facts.

“A. In the year 1894, or 1895, I have forgotten which, I did

“some work for the Poorman mine, the Coeur d’Alene Silver
“Lead Mining Company, I believe it was called, underground.

“Q. In what capacity did you do the work?

“A. As engineer and surveyor. This work was placed on the
“working map delivered to me and used by the company at that
“time.

“Q. What company?

“A. The Coeur d’Alene Silver Lead Mining Company.

“Q. State whether or not this is the same map and the same
“data that you furnished Mr. Smith and which he says he placed
“upon these maps.

“A. The plan was, yes, sir. The work was carried on by
“myself to the 900 and I think the 1000 foot level. I have for-
“gotten the details.

“Q. Did it include the 600 and 800 foot levels?

“A. Yes, sir, I will come to that in a minute. It was a map
“carried on by me, having been the original principal works of
“it made by Mr. Trask and Mr. Loring, and as far as the 600
“foot level went, I surveyed it, I don’t think the full length
“to where it is now. My recollection is I carried it through
“the O’Neill and Missing Link and—

“Q. Through the Ella and Missing Link, you mean?

“A. Through the Ella and Missing Link, and some little dis-
“tance into the O’Neill, but I cannot say exactly how far. As
“to the 800, I did not carry it, I should judge, but about to
“the Ella; I can’t recollect just where the 800 was at that time,
“but I think it was very close to the Ella, and it might have been
“in it, but I would not say positively. However, this old map
“was found by myself or by the company *when we came into*
“*possession at Burke*, and I found some of my work on it.

“Q. Found it where?

“A. In the vault at Burke, in the company’s office. And I found some of my old work on it, and this was the basis of placing the 600 as far as that old map went, on Mr. Smith’s maps, which I assisted in and dictated, both on his sections and plans. Now, I will explain something further, that I think the 600 is shown on some of these maps farther than I surveyed it, so of course, I cannot testify as to that. That was done from a map found there, too, but who put it on there of course I cannot say.

“Q. Found where?

“A. Found in the office on the map.

“Q. Of what office?

“A. In the Buffalo Hump Mining Company’s office at Burke.

“Q. Had this office, had the Poorman, or the Coeur d’Alene Silver Lead Mining Company ever had possession or anything to do with this office or vault?

“A. Not this particular office. The old safe that the company used to use was in there.

“Q. How, if at all, do you identify this map as being a map of the company?

“A. Because I made a portion of it myself.

“Q. I mean the portion that you did not make, the other map that you spoke of?

“A. Well, it was used as the working map. They did not have very many working maps at the time there; they were not very complete. It seems that the Consolidated Tiger-Poorman Company were not given to surveys to any large extent.

“Q. You then have personally surveyed the 600 foot level

“as it passes through the Ella and Missing Link claims?”

“A. Yes.”

Now, how could Mr. Miller make these surveys unless he knew where the east end line of the Poorman was; that line is coincident with the west end line of the Ella. If this was not known to him, then it must have been to Mr. Trask and Mr. Loring who he says started the maps.

He speaks of an old map, but tells nothing about its contents. Is it not just possible that this mysterious map that the defendants neglected to put in evidence, that his witness neglected to give any particulars of, is the map whereon Mr. MacDonald pointed out to Mr. Sweeny that the course of drill hole No. 2, if continued, would penetrate the Ella ground? Mr. Miller says he found it there before the time that Mr. MacDonald testifies that he pointed out the course of that drill hole on the map to Mr. Sweeny, viz.: when they came into possession at Burke (see page 717, Vol. II, Trans.). But let us go a step further. Mr. Culbertson testified (see page 229, Vol. I, Trans.):

“A. The first map that was made did not contain a true and correct condition of the property.

“Q. Was it practically true? Was the purpose of it to show the correct condition?”

“A. Why, it was supposed to be at the time it was made.

“Q. Who made it?”

“A. A man by the name of McCormack.

“Q. What did he make it from?”

"A. *From a survey.*

"Q. *A survey that he made?*

"A. *Yes.*

"Q. Was that survey afterwards checked up by anybody?

"A. Yes.

"Q. By whom?

"A. By a man by the name of Smith.

"Q. When?

"A. In October or November of that year."

Now, if Mr. McCormack made a map "from a survey," how could he make it without connecting with the surface lines or with the lines as established by the old map, which were necessarily connected with the surface lines. The McCormack map was made before the complainants sold their interests; that is, before October.

This is conceded by Mr. Culbertson. He says it was made in September, 1899, he thinks, (see page 228, Vol. I, Trans.), though he fails to mention Mr. Booth, whose affidavit shows he began work September 1st, 1899, as a surveyor for the defendant companies, no doubt taking McCormack's place (see Booth's affidavit, printed in separate volume of transcript). Mr. Culbertson testified that there were some inaccuracies in the work of Mr. McCormack, but they were not discovered until Mr. Smith became employed by the defendants, and Mr. Smith testified that he did not work for the Buffalo Hump Company at Burke until November or December, 1900. But in contradiction of this, Mr. Smith testified (see page 707, Vol. II, Trans.):

“Q. Did you find any of his (McCormack’s) work in “the office?”

“A. I think I did; some notes.

“Q. Were you ever called upon by the company or any “of its officers to check up McCormack’s work?”

“A. No, sir.

“Q. You never were?”

“A. No, sir.

“Q. Quite sure of that?”

“A. Yes, sir; in this mine I am sure of it.”

From this it will be seen that Mr. McCormack’s work was considered all right for about a year; his work was relied upon and used by the defendants at least until long after the time of purchasing from complainants. Upon his work, evidently, the properties were all bought. It is shown that in the Ella and Missing Link no intermediate levels were run between the eight and the twelve hundred, and that no other level in the Poorman mine was extended to within several hundred feet of the Ella west line, except the twelve hundred. The six and eight hundred in the Ella had been connected with the surface lines by Miller, Loring and Trask, and therefore there was no occasion for Mr. McCormack to make any survey or surface connection at that point. No other level having extended to within several hundred feet of the Ella west line except the 1200 and that having been pushed clear through both the Ella and the Missing Link into the O’Neill during the time when Mr. McCormack was in the employ of the defendant com-

panies as surveyor, and during the time when he says he made a map "from a survey," we think it is conclusively shown by the record that Mr. McCormack made a survey of the 1200 through the Ella and Missing Link, and just how he could make that survey without connecting with the surface lines we are unable to state.

Certainly the main working shaft on the consolidated properties had been established and sunk with reference to the surface lines. How long would it have required to connect the 1200 with it?

Mr. Culbertson then testified that Mr. McCormack was discharged. The conclusion we reach is that he, having made this map "from a survey" and the ore having been found in the drill holes within the Ella ground, he knew too much to be of any further use. They may not have known him well enough to retain him pending the purchase of complainants' property. The defendants had to know their men.

The McCormack maps were evidently suppressed from Mr. Booth, who was the next engineer to succeed him. In his affidavit he says not a word about them. (See affidavit of A. A. Booth, printed in separate volume of the transcript). It is fair to infer that if Mr. McCormack's work had been given to Mr. Booth and had there been any inaccuracies in the work, he would have discovered it, and not Mr. Smith, who succeeded Mr. Booth twelve months after Mr. McCormack disappeared from the scene, and if Mr. Smith did discover the inaccuracies

said to exist in Mr. McCormack's work, it must have been at least twelve months after the time Mr. McCormack did the work, because he was not employed until about that length of time thereafter, and it could not happen in November or December of 1899, as stated by Mr. Culbertson. (See pp 229-30, Vol. I, Trans.)

Mr. Miller testified that he found an old map, says he did not know who made it and no one has stated where it came from or who made it. Why this uncertainty? It was defendants' map, and in their possession. They are claiming to be innocent parties. Why do they give the Court a small part of the testimony, just enough to create confusion, and stop there? Mr. Culbertson and Mr. Miller testified that the Poorman-Tiger did not do much surveying, that the Company was hard up, but it was certainly not a very big job to survey that one level. But whether the survey had been made or not, the Buffalo Hump Mining Company knew the Ella lines apparently well enough to start drill hole No. 1 and drill hole No. 2 beyond and outside of the east end line, and they appear to have known that line well enough to have drill hole No. 2 not only start without that line, but to carefully penetrate the ore body within the Ella a very few feet from its east end line. The Ella and Missing Link are about 200 feet in length, along the course of the vein. They seem to have known this too, because they dropped back from drill holes one and two 210 feet so as to clear the west line of the Ella, and there they start to cross-cut within their own ground and give it (the cross-cut) such a course and di-

rection as to strike the ore body less than 18 inches inside the west line of the Ella (see p. 210, Vol. I, Trans.).

Again Mr. Culbertson testified at pp. 242, 244, Vol. I, Trans., that he kept Mr. Patrick Clark advised, and talked freely to him about the work on the 1200, while the "abandoned drift" was being pushed through the Ella and Missing Link ground. If the defendant companies didn't know the lines and if no survey had been made connecting with the surface lines, how was Mr. Culbertson able to advise Mr. Patrick Clark as above stated?

Defendants' answer states that the ore was penetrated on the east end of the Ella and within the Ella "because of the carelessness on the part of the drill men * * *" This is very inconsistent with the theory that the defendants did not know the lines, and is an express admission that they did know the lines, and that the drill man in violation of instructions took the wrong course for his drilling.

Mr. Culbertson testified (see page 228, Vol. I, Trans.) that the defendant companies always kept a progress map. Mr. Smith testified (see page 704, Vol. II, Trans.):

"Q. You have testified that you made the progress map kept by the companies. Where is that map?

"A. I have copies of it in our office here. The principal map, the working map, is in Burke.

"Q. You have copies of it in this office in Spokane?

"A. Yes, sir.

"Q. Can you produce us a copy of that progress map after lunch or during the day or during this session?

"A. I can. ✓

"Q. Will you do so?

"A. I don't know.

"MR. STOLL: Mr. Heyburn, we demand that you produce
"us this afternoon or before the termination of this session and
"before we are through with the examination of this witness,
"copy of the progress map.

"MR. HEYBURN: I have offered it in evidence this morn-
"ing and you have it here now.

"WITNESS: Not the progress map.

"MR. HEYBURN: Is not that the progress map up to
"date?

"A. It is up to date, but it does not show the *progress of*
"*each month.*

"MR. STOLL: We want the progress map to which he has
"testified.

"MR. HEYBURN: Sufficient unto the day is the evil
"thereof. You have made your demand."

The day came, but the map never. Was the Circuit Judge, in the face of this evidence, justified in concluding that Mr. MacDonald was unable to point out on the map to Mr. Sweeny the course of drill hole No. 2, demonstrating to him that it would go through the Ella if continued in the direction that it started? We think not.

If the defendants were innocent, as they claim they were, of any wrong in the premises, if they did not deliberately prospect complainants' ground with a diamond drill for the purpose of defrauding complainants, if they thought the drill work was

within their own grounds, why should they suppress the progress map; why should they not bring to the aid of the Court every possible piece of testimony in their possession; why did they start without the Ella east line and within the O'Neill lines and start the drill so as to strike the ore body a very few feet within the Ella lines? Having done that, why did they drop back 210 feet and start their cross-cut at such a convergent course that it would intersect the line of drill hole No. 2 if driven about 325 feet, and why is this cross-cut so carefully arranged and planned that it dropped upon the ore body immediately upon the Ella west line? Why is drill hole No. 2 started the same distance east of our east line that the cross-cut is started west of it (a scale put upon any of the maps will demonstrate this) and having discovered the ore at our line, why did the defendants drive through it into the Ella ground, a distance of about 20 feet, before they were sufficiently satisfied with it to make the purchase. It seems to us that this shows not only that a survey had been made, but that the survey was exceedingly accurate. Mr. Booth states (in his affidavit printed in separate volume of the transcript) that he started a *progress* map in September. Mr. Miller states that the old map he found was a *working* map. The lines on the 600 and 800 were established by Messrs. Loring, Trask and Miller, as heretofore shown by Mr. Miller's testimony. There was no other level at the time Mr. McCormack worked there up to the east end line of the Poorman except the 1200. The ground was caved in on the upper levels so that they could not get into the 600 and 800

until about two years after Mr. McCormack left the employ of the company. Therefore it does not require any great amount of speculation to determine upon what level Mr. McCormack made his alleged error of 10 feet in locating the east end line of the Poorman.

Mr. Miller testified at page 946, Vol. III, Trans., as follows :

“That from the month of July in the year 1899 to April, 1901, he was consulting engineer of the Tiger-Poorman mines, then owned and operated by the Buffalo Hump Mining Company, the defendant herein; that affiant was, during the year 1894 and until January 10, 1895, acquainted with the mining claims mentioned in the complaint and called the Ella and Missing Link lode claims; that during all of said time he has been thoroughly conversant with the nature, character and extent of the development work upon said mining claims and all of them, the nature, character and value of the ores extracted therefrom, plans of operation and projected plans of operation of said mining claims and property.”

It will appear from the map that drill hole No. 2 and hole No. 3, 210 feet apart, are parallel, or practically so. Mr. Culbertson has testified at p. 215, Vol. I, Trans. (we quote only a portion of his answer) :

“We found ore in all three of these holes, and the object of starting this cross-cut, which is known as the south cross-cut, from the 1200 was because it was, you might say, in the middle of the two holes or midway between them.

“MR. HEYBURN: That is, midway between drill hole No. 2 and drill hole No. 4?

“A. Yes sir, practically so, not exactly * * *”

And again at page 217, Vol. I, Trans.:

"We had a little ore in each of them (referring to drill holes "2 and 4). The object was to strike the *body of ore* some-
"where near the center as shown by the drill hole, and it was
"for that reason that the hole (cross-cut) was started there."

Evidently the defendants were very wise underground calculators, or else they had, prior to that time, had a very accurate survey, because the cross-cut (which was started within their own ground) indicates that the ore was struck (within complainants' ground) at the place they intended to tap it, viz., practically midway between these two holes. (See map.)

Mr. Culbertson testified that the first knowledge that they had of the fact that the Ella ground had been penetrated by a diamond drill was in October when a survey disclosed that fact (see p. 211, Vol. I, Trans.) as follows:

"Q. When did you first know that it had penetrated the "Ella ground?

"A. Not until after we had run the cross-cut and had had a "survey made.

"Q. About when was that survey made that first disclosed "that fact?

"A. In October.

"Q. What time in October; before or after the purchase "of the Ella claim?

"A. Well, *I couldn't state that with any degree of certainty "without having access to the books up there."*

It is uncontradicted that complainants' deed was not delivered until the 20th of October, and that the consideration did not pass until that day. Here is an admission of Mr. Culbertson

under whose direction the drilling was done that the survey made in October disclosed that they had penetrated the Ella property, and a further admission that their books would show when that survey was made, but they do not produce the books, and again, *as in the case of the progress map*, they leave uncertain that which they could have made absolutely certain by testimony *in their exclusive possession*, had they been disposed to deal fairly with the Court and the parties to the litigation. The inference in a court of equity is that this proof would have been against them. See authorities, *supra*.

In connection with this east end line of the Poorman, it is worthy of notice that the defendants were all the time hunting for and concerned about the east end line of the Poorman; the west end line of the Poorman seems to have been overlooked entirely. Whether the defendants, or any of them, knew where the lines of the Poorman and the Ella were or not, is quite immaterial in law. They were bound to know where they were, and it is no excuse or defense for them to say that they committed these trespasses ignorantly.

In Tennessee, a coal mining company, mining underground, was approaching one of its terminals; instructions were given to the foreman not to cross the boundary line, but to leave a margin. The foreman testified that he did step the distance on the surface, but was deceived in the direction of the first branch, and the miners began to talk about the mine having crossed the boundary. Under these circumstances, complainant sent an en-

gineer, who did actually measure the surface of the ground. As a result of his survey, he reported to the defendant that the first branch was over the line twenty-seven (27) feet, but that the other branches were not, and he told the defendant's foreman how far he might safely go. Work was at once stopped in branch No. 1 and never resumed. The other branches were continued within the limits designated by the engineer. After commencement of the litigation the same engineer made a new survey of the surface and found that he was in error as to his first survey about eleven and one-half (11 1-2) feet, to that extent increasing trespass on complainant's land and the amount of coal mined. The evidence was clear that neither the defendant nor his foreman intended to or did permit the working of the branches beyond the points designated by complainant's engineer. Upon these facts, the Supreme Court in *Coal Creek Min. & Mfg. Co. vs. Moses*, 15 Morrison's Mining Reports, 544, (54 Am. Rep. 415) thus decided the rights of the parties:

"Upon the foregoing facts we may say that it was the duty of the defendant in the first instance to have made the necessary surveys to prevent any encroachment upon the land of complainant. He was in fault in not so doing, and he was also in fault in not keeping accurate accounts of the coal mined in each of the branches in the vicinity of the boundary line. For these omissions of duty on his part the master was clearly right in construing the evidence liberally against him."

To same effect, and a still stronger announcement of the rule, is *Durant Min. Co. vs. Percy Consol. Min. Co.*, 35 C. C. A.,

252; Golden Reward Min. Co. vs. Buxton Min. Co., 38 C. C. A., 228.

How the Circuit Judge, after announcing the following rule of law, can still consistently enter a decree for the defendants, in the face of the testimony, we cannot understand, viz.:

“Were I convinced that this work had been done clandestinely and with a view of taking advantage of the complainants, I should hold that a purchase without a communication of all the facts to the seller should be rescinded.”

What meaning has the term “clandestine?” Webster defines it as follows:

“Conducted secretly; withdrawn from public notice, usually for an evil purpose, kept secret, hidden, private, underhand; as a clandestine marriage.”

Was this not done secretly? Does not Mr. Culbertson testify that before the strike he talked freely with Mr. Patrick Clark, and that after the strike he never told him anything at all? Does not Mr. Culbertson testify on behalf of defendants that the drill cores were given to him by the drill gang, and that he put them in a sack and then in a locked cupboard, and that no one else had access to them except Mr. Sweeny? (See page 944, Vol. III, Trans.) Was the work not done 1200 feet under the surface of the earth, with no means of ingress or egress except through the workings owned by, and in the exclusive possession of, defendants? Did they not commit trespasses on our property under the cover of this big mountain that lay between the shining sun and the point where the drill hole pene-

trated? Did they tell anybody? Did Mr. Culbertson not say, at page 213, Vol. I, Trans., that "We were *not publishing re-*
"sults?"

Did not Mr. Sweeny testify at p. 901, Vol. III, Trans., that :

"Q. Now, Mr. Sweeny, I would like to have you give me "a direct answer to this question if you can do so. Do you think "you had a right, and that it was quite fair dealing for you to "prospect at depth in adjoining ground to that which you "owned, and then attempt to purchase either that or the adjoin-
 "ing ground to that without advising the parties from whom "you were purchasing as to what you had done —

"MR. HEYBURN: I object to that as immaterial.

"Q. (The question was read).

"A. Had a right to try to purchase it? Well, I didn't think "there would be anything very wrong in that, no.

"Q. You didn't think, what?

"A. I didn't think there would be anything very wrong about "that if I operated in my own territory, and from operations in "my own territory got an idea as to what other things were "worth, I certainly would not go on telling the whole United "States about it so that they could come around and *place all*
"kinds of values on it, if I wanted to buy it. It would not be "business."

Did not Mr. Sweeny in addition also state to Mr. Joseph MacDonald not to state anything about the strike, as he wanted to buy the complainants out for a song?

The testimony upon this subject, to which the Circuit Judge no doubt refers, is the testimony of Mr. Charles Sweeny (see p. 903, Vol. III, Trans.):

“Q. You must necessarily have known that you had gone through the Ella.

“A. No, sir.

“Q. In order to get to the O’Neill?

“A. Oh, we passed through it in the drift, certainly.

“Q. And you were using that drift for the purpose of prospecting to the south?

“A. We were using privileges that were opened to go through there.

“Q. You were using this drift through the Ella?

“A. *It is evident from all the evidence that the Poorman-Tiger drove these drifts and we owned the Company and were entitled to go through unless somebody objected.*

“Q. And nobody did object?

“A. No, sir.”

Mr. Culbertson testified (at p. 242, Vol. I, Trans.) :

“Q. When was it Mr. Clark authorized you to run through the 1100 or 1200 foot level into the Ella?

“A. He never authorized it.

“Q. He never authorized it?

“A. No.

“Q. I understood you to say that he gave you permission or authority or directed you to do it?

“A. No, we took it.”

The policy of the Tiger-Poorman Company, dominated as it is claimed by Mr. Culbertson, is not only approved but is continued by Mr. Sweeny on behalf of his companies immediately upon succeeding to the ownership of the property.

In this connection it is worthy of note that the defendants started drill hole No. 2 thirty feet east of our east line, and the cross-cut the same distance (thirty feet) west of our west line. If this is a coincidence it should be considered in connection with the many other coincidences in this case.

Mr. Sweeny claims that his company owned the Poorman-Tiger Company and therefore was entitled in law to go through there unless somebody objected, and he says nobody did object. This is equivalent to ratifying whatever may have been done by the Poorman-Tiger Company, which Mr. Sweeny says his company at that time owned. He claims his rights and privileges, whatever they were, by virtue of trespasses that had been committed by the former company, to which he was the successor. He makes no claim or pretense that *the complainants knew he was using this drift or that they acquiesced in it*, and in that regard the Circuit Judge has drawn a conclusion not warranted by the evidence. His right to use that drift is no greater than the right of a man, who finds a house open, to move in and occupy it because there is no objection. Who could object? How could any person get on the ground to object without going through the private openings—the shaft and drifts of the defendants who were committing the trespass? But assume that the defendants, having found this drift there, were not guilty of a trespass in simply using it to pass to and fro from the O'Neill claim to their shaft in the Poorman. Is it going to be contended and claimed to be the law that, *for that reason*, they had a right to use that drift, without our knowledge, or

permission, for the purpose of prospecting our ground? The Circuit Judge finds that their prospecting in that vicinity was not clandestine and therefore not unlawful *because they found the drift there*. We cannot conceive how the finding a drift through our property, admitting the assumption that it was put there by another trespasser, can excuse the defendants in their trespasses, or warrant the conclusion that the defendants' exploitation of our ground was less unlawful than it would otherwise have been. But if we concede, for the purpose of the argument, all that is contended for by the defendants or concluded by the Circuit Judge in that regard, how does it justify the defendants in starting the cross-cut about 30 feet to the west of our west lines, upon defendant's own ground, equi-distant from the working found by Mr. Sweeny, and drive their cross-cut into our grounds? Defendants made no use of the workings which it is claimed Mr. Sweeny found on our ground to drive that cross-cut. After driving it 47 feet through their own grounds, they deliberately crossed our line, found the ore body on our side, and took possession. This is the possession, the only actual possession (*possessio pedis*), the defendants had, and this possession the Circuit Judge finds was not clandestine because Mr. Sweeny found some workings on our ground about 30 feet distant easterly therefrom.

How the Circuit Judge harmonized the conclusion made by him, *supra*, (1) with the citation of authority made by him, to-wit, *Loehr v. Harris, supra*, we do not know, but if additional authority is necessary to show the application of the doc-

trine of that case to the facts as found by the Circuit Judge, we cite the case of *Stewart v. Wyoming Ranch Co.*, 128 U. S., 388, where Mr. Justice Lamar, on behalf of the Court, used this language:

“In an action of deceit, it is true that silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation. But mere silence is quite different from concealment. *Aliud est tacere, aliud celare*; a suppression of the truth may amount to a suggestion of falsehood. And if with intent to deceive either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraud producing a false impression upon the mind of the other party, and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of complainant.”

In *Laidlow vs. Organ*, 2 Wheaton, 178, Chief Justice Marshall announced a similar rule, thus:

“The question in this case is whether the intelligence of extrinsic circumstances which might influence the price of a commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor. The Court is of opinion that he would not be bound to communicate it. It would be difficult to circumscribe a contrary doctrine within the particular limits *where the means of intelligence were equally accessible to both parties*, but at the same time *each party must take care not to say or do anything tending to impose upon the other.*”

It will be noted that the Circuit Judge advised the Clerk not to send up as a part of the transcript the affidavit of Mr. Booth for the reason that he had not considered it upon the trial, and that for that reason it was not a part of the testimony in the case. The failure of the Circuit Judge to consider this affidavit which is a material part of the testimony is, we think, gross error. At pp. 89 and 90, Vol. I, Trans., will be found "Stipulation as to Complainants' Evidence." We quote a part of it:

"It is hereby stipulated and agreed that the complainants may offer in evidence such further documentary evidence * * *, the same to include * * * together with all the files, records and notices of every kind and nature served in this case and now upon the files herein * * *"

This affidavit being filed by the defendants in opposition to an application for a receivership herein, is clearly admissible under this stipulation *as against them*. True, they could not offer it in evidence, but we can offer it in evidence for the purpose of contradicting testimony subsequently offered by them, being statements made by them against interest.

III. Was the Circuit Judge justified in concluding that "Complainants made no sufficient effort prior to the sale to ascertain the value of the property?"

The bill charges, and the answer admits (see paragraph V of the bill and paragraph V of the answer), that the only means of access to the underground workings in the Ella and Missing

Link claims was through the main working shaft sunk on the Tiger mine, one of the properties of the Buffalo Hump Company, and that the shaft and all of the drifts connected with it were in the exclusive possession and under the control of the Buffalo Hump Company. The only means of examining the underground workings of the Ella and the Missing Link claims to ascertain if any trespasses had been committed upon them, and if any ore had been discovered within them, was through the works of the Buffalo Hump Company. We had no right *in law* to demand of the Buffalo Hump Company the use of its shafts and drifts for that purpose. We had no right to examine their works. The drill hole did not start in our ground nor did the cross-cut, therefore we had no right to enter either, and beyond that there was nothing to examine save a barren drift. If Mr. Sweeny had stated to us the whole truth, and had not made any false representations to us, we would probably not have been denied admission through the shaft into the underground works on the Ella. But suppose that, as we now contend, he had stated to us a falsehood. Is it probable that the Buffalo Hump Company, of which he was the dominant spirit and general manager, would have given us the use of its shaft and drifts to expose the fraud that Mr. Sweeny was attempting to perpetrate upon us, when it was not required to do so in law. It is in evidence, both by Mr. Sweeny and Mr. Culbertson, that at that time they did not know, and the Buffalo Hump Company did not know, where the Ella and Missing Link lines were, and this, too, *when they were working exten-*

sively at the east end of the Poorman (one of their mining claims), and the west end of the O'Neill (another of their mining claims), between which two claims the Ella and Missing Link lie. Mr. Sweeny and Mr. Culbertson have both testified that they knew that the Ella and Missing Link claims lay between the O'Neill and the Poorman. Defendants' witnesses testified that in the summer and fall of 1899 the Buffalo Hump Company had in its employ Messrs. McCormack, Booth and Miller as surveyors and engineers. They have shown that they had maps of the mines, and yet they were unable to state where the lines of the Ella and Missing Link were. How, then, were we expected to go down *their* shaft, through those long, circuitous drifts, all unknown to us, and discover the *locus* of the Ella and Missing Link. It is in evidence that on the 1200 the drift runs from the main shaft of the Tiger without a break clear into the O'Neill. How were we to determine what particular part of this drift contained the Ella and Missing Link? And suppose that we had found the lines of the Ella and Missing Link on the 1200, how were we to determine what discoveries were made within them? A drill hole had been bored, it is true, (drill hole No. 2) but that hole was started about thirty feet without the Ella and Missing Link lines and it would be a wise man who could guess the course of that drill hole to be so far divergent from right angles with the drift as to carry it within the Ella lines, assuming him to be wise enough to discover the drill hole upon the wall of the drift. Would the defendants have pointed out the drill hole to us without our asking? Would

we have been able to have inquired about it without knowing of its existence?

But the other side will say that we might have ascertained the condition of the property from the cross-cut that struck the ore on the west end of the Ella. Mr. Sweeny has testified that his conversation with Mr. Patrick Clark took place on the 4th or 5th of October, at which time the cross-cut had not reached the ore. The ore was reached on the 8th of October. (See evidence of Mr. Thos. Jay, defendants' foreman, at page 427, Vol. I. Trans.) Therefore, at that time, it would have been quite useless to have examined the cross-cut, because the ore was not struck until the 8th of October; beside, the cross-cut was not started within our ground and while we were entitled, had we known of its existence, to examine that portion which penetrated our ground, how were we to do so except by procuring a license from the Buffalo Hump Company to enter its cross-cut started within its grounds?

We had no right to examine *their property, their cross-cuts and drifts* made in *their mine*. This cross-cut started about 30 feet within *their lines and outside of ours*. It was run directly at right angles with the drift, a very different angle from drill hole No. 2, and nothing about it to indicate to us that it was so carefully planned and arranged that it should drop upon the ore body immediately upon or within our line, and therefore we could not have advised ourselves of the condition of our property from an examination of the cross-cut, even though it had been in the ore at that time. It is earnestly contended by the

other side, and we must concede the law to be, that the defendants were not required to advise us of the condition of the ore bodies *lawfully* found by them within their own property, although within a few feet—yea, a few inches—of our lines. But, standing as they do, so strictly upon this technical rule that approaches very closely to the danger line, even in the abstract application of it, is it possible that the defendants would have allowed us to examine this cross-cut, starting within their lines, and tapping a part of the ore body within our lines?

It will appear from the testimony of Mr. Ralston, also Mr. Harvey, one of the complainants herein, that when they examined the Ella and Missing Link under the order of the Court, they were not allowed by defendants to pass beyond the east line of the Missing Link, nor to make any examination of any ore body west of the west line of the Ella (see p. 621, Vol. II, Trans.). If, after a suit is brought charging fraud and the defendants are called upon by the highest considerations, not only to exonerate themselves, but to satisfy the Chancellor of their contention, they draw such fine distinctions and stand so technically upon their legal rights, by what line of reasoning are we warranted in the conclusion that prior to the time they were charged with this fraud they would have been more liberal in allowing us to examine the approaches to our ground on either side?

But assume that the defendants were, as we claim, intending to perpetrate a fraud upon us, and suppose that we indicated that we did not believe the statements made to us by their gen-

eral manager, and that we wanted to make an examination ourselves, could the defendants not easily have timbered and lagged up tightly a section of the 1200 foot level, say 100 feet in length, including the point at which the cross-cut was started, and thus have prevented us from ascertaining anything that was found in it, or any knowledge of the fact that it had ever been run? We would never think of pulling out the lagging to examine, if at all, anywhere except within our own lines, nor would we have the right to ask for an examination of anything without our lines. We would hardly be expected to infer that a cross-cut started within their lines intersected an ore body within our lines. In other words, the peculiar conditions surrounding this situation were such that an examination would not have been practicable, and would simply have aided defendants in their unlawful scheme. If we had attempted to make an examination, we would not only have been unsuccessful, but we would now be confronted with that other rule of law to the effect *that we did not rely on the statements of Mr. Sweeny, but acted upon our own information*. In the face of the positive statements made by Mr. Sweeny and Mr. Culbertson, in no event was it necessary in law for the complainants to have made an examination or to have made inquiries, even though it had been practicable. The rule is very forcibly stated by the Supreme Court of Kansas in *Speed vs. Hollingsworth*, 38 Pac., 497, and is supported by the best considered American cases, as follows:

“The trend of the decisions of the Courts of this and other states is towards the just doctrine that where a contract is

“induced by false representations as to material existent facts, which are made with the intent to deceive, and upon which the plaintiff relied, it is no defense to an action for rescission or damages arising out of the deceit, that the party to whom the representations were made might with due diligence have discovered their falsity, and that he made no searching inquiry into facts. ‘It matters not,’ it has well been declared, ‘that a person misled may be said in some loose sense to have been negligent; * * * for it is not just that a man who has deceived another should be permitted to say to him, ‘You ought not to have believed or trusted me,’ or ‘You were yourself guilty of negligence.’”

The Court then cites Bigelow, *Frauds*, 523, 528, 534.

Kerr, Fraud & Mistake, 80, 81.

Pomeroy vs. Benton, 57 Mo., 531.

Redgrave vs. Hurd, 20 Ch. Div., 1.

Simar vs. Canaday, 52 N. Y., 306.

Schumaker vs. Mather, 133 N. Y., 590.

Redding vs. Wright (Minn.), 51 N. W., 1056.

Ledbetter vs. Davis, 121 Ind., 119.

Furnace Co. vs. Moffatt, 147 Mass., 403.

The Supreme Court of Oregon in *Cawston vs. Sturgis*, 43 Pac., 656, uses this language:

“To turn him out of Court under such circumstances, because he did not go to the trouble and expense of having the area of the land ascertained by actual measurement, but chose to rely upon defendant’s representations, would be offering a premium upon fraud and deceit. Mere knowledge of the boundaries did not charge him with knowledge of its area, so as to relieve the defendant from responsibility from his

“false and fraudulent representations in reference thereto,” citing numerous authorities.

Judge Sutherland, in his work on Damages (see Vol. 3, page 586, 1st Ed.), announces the rule thus:

“If the facts are not known to him, and he has not equal means of knowing the truth, there is no legal duty not to rely on the statements of the other party.”

Roberts vs. Plaisted, 63 Me., 335.

Savage vs. Stevens, 126 Mass., 207.

Greens vs. Hallenback, 24 Hun., 116.

Where the representations related to the size and location of lots which were the subject of negotiation it was held in Minnesota that the plaintiff could not be charged with negligence for relying upon the representations instead of consulting the recorded plat.

Porter vs. Fletcher, 25 Minn., 493.

In Illinois it was held that where the land relative to which the representations were made was only six miles away, the plaintiff had a right to rely on the representations.

Nolte vs. Reichelm, 96 Ill., 425.

And so in Massachusetts, where the matters were peculiarly, though not exclusively, within the knowledge of the defendant.

Nowlan vs. Cain, 3 Allen, 261.

The purchaser of an interest in goods has a right to rely on the seller's representations that he is the owner; and he is not

negligent if he fail to test the correctness of such representations.

Hale vs. Philbrick, 42 Iowa, 81.

The Court say: "We are not inclined to encourage falsehood and dishonesty, by protecting one who is guilty of such fraud, on the ground that his victim had faith in his word, and for that reason did not pursue inquiries that would have disclosed the falsehood."

Bondurant vs. Crawford, 22 Iowa, 40.

Van Epps vs. Harrison, 5 Hill, 63.

Bank of Woodland vs. Hiatt, 58 Cal., 234.

The constructive notice by the record of a mortgage will not deprive a purchaser of the right to rely on the vendor's positive statements, fraudulently made, that the property is unencumbered, nor will it prevent him from suing for the false representations.

Weber vs. Weber, 47 Mich., 569.

Mr. Sweeny has testified, and the Judge of the Circuit Court found, that it was the purpose of the Buffalo Hump Company to purchase a large amount of ground in and around the Tiger and Poorman mines, simply for their surface value, and not because of any ore values, and that pursuant to such policy, it did purchase a large amount of ground. The Buffalo Hump Company also bought from the complainants in this case the Sheridan, which never had any value as a mineral claim, simply valuable for the surface, and paid practically the same price for it that they did for the Ella and Missing Link. Therefore, Mr. Sweeny's statements to Mr. Patrick Clark that he only

bought the Ella and Missing Link because of their situation and the surface value that they had, is very plausible, is a story that would allay suspicion if any existed, and is calculated to throw a diligent man off his guard. The statement of Mr. Sweeny that they were not worth \$15.00 as mineral claims confirmed a preexisting opinion by Mr. Clark to the same effect, as he, while manager of the old Poorman Company, discontinued work on the 800 foot level because the ore had been practically exhausted. Mr. Culbertson testified (see page 239, Vol. I, Trans.) that he did not think the Ella and Missing Link had sufficient value when his interest was deeded to him to justify him in recording his deed, and then said:

“The actual value at that time was very small, from the fact “that the ore had been practically worked out of the ground.”

Mr. Culbertson testified at page 208, Vol. I, Trans., and here he shows defendants to be guilty of a trespass due to wanton recklessness, equally culpable with a trespass committed willfully:

“Q. At the time you selected or determined upon the direction of that drill hole did you have in view the question of “the Ella or Missing Link claims at all?

“A. No, sir.

“Q. What were you boring for?

“A. We bored the hole out there simply from the fact that “it was the furthest drift out in that vicinity * * *”

And again at page 209, Vol. I, Trans.:

“Q. Now state if you knew at the time you drilled that “hole that it entered the Ella or Missing Link claims at all.

“A. I did not know it at all.

“Q. Did you intend it at the time you drilled it?

“A. It was not drilled with that intention. It was simply drilled from the fact that it was the furthest working east. “We wanted to cross-cut it * * *”

Page 246, Vol. I, Trans., he says:

“Well, we were just naturally drifting that way; we didn’t know where we were.”

At page 898, Vol. III, Trans., Mr. Sweeny testified:

“Q. You didn’t care anything about where you were trespassing?

“A. Well, we were buying all the ground and it didn’t make any particular difference where it was.”

Mr. Sweeny in his affidavit, (see page 1001, Vol. III, of the transcript) used this language:

“But had any of the said complainants at any time requested information as to the said developments it would have been cheerfully given them.”

What would have been given them? How could he have given us anything? What did he know to give? Has he not before stated, and did not Mr. Culbertson also testify, that they did not know where the lines were, that they did not know that they were working in our ground? Did Mr. Sweeny mean to be understood that he would have advised us of the condition of the adjoining ground in the Poorman on the one end, and the O’Neill on the other, if we had asked him? If so, he has changed his attitude very materially and very frequently.

IV. Clark Stopes and Ore Showings there.

It is contended by the other side, and in fact the principal defense to this case is, that the complainants had worked out the premises in controversy to the 800 foot level, and that in doing so they had familiarized themselves with the premises so that they should not have been imposed upon. The further contend and attempt to show that the ore struck on the 1200 by the diamond drill and the cross-cut is a continuation of the vein which they worked on the 800. They further make an attempt at showing that there is merchantable ore in the stopes at the point where the complainants discontinued work on the 800. And the suggestion is made, we think by Mr. Miller, perhaps one other also, that the ore there is as good as at some places in the Ella further down. For the purposes of the argument, let us assume that there was sufficient ore in the 800 to justify mining when the complainants discontinued work there. Mr. Culbertson has testified, as we have shown before, that he notified Mr. Patrick Clark and Mr. Harvey, two of the complainants, that on the 1200 they had run through the Ella on a mere stringer and found no ore. Now, there could be no dispute about that; Mr. Culbertson testified to that himself. The thing that gives value to a mine is not the immediate bunch of ore that you may have in sight at a given place, but the continuity of the ore body vertically and longitudinally. The stopes on the 800 were short. Between the 800 and 1200 is 400 feet, and if in that distance the ore, which, according to the testimony

of these witnesses was far from promising, had entirely discontinued, it would be about the most depressing condition that could possibly affect the mine; while upon the other hand, if complainants had known that 4 feet further in the earth, to say nothing about 400, the ore body had widened to 10 feet, 6 feet of which was shipping ore, see the difference in effect it would have had, not only upon the value, but upon the prospects of the property; and while this argument is entirely sound, we are not driven to it. Mr. Culbertson testifies that the only value that was attached to the property at the time of his conveyance was a prospective value. At page 239, Vol. I, Trans., we find him testifying as follows:

“Q. Tell us what value you placed on it? What did you think it worth? A. I thought the prospective value might be considerable. The actual value at that time was very small from the fact that the ore had practically been worked out of the ground. We desired the ground as a body of ore might be found down below, and I felt a reasonable assurance of finding something down below the 800 where Mr. Clark had worked.”

Mr. Miller and Mr. Cartwright have testified to finding merchantable ore in the Clark stopes, but we call the Court's special attention to the fact that they particularized nothing; they stated generally that it was merchantable ore, that it was as good as was found farther down in the mine afterward. In other words, they state conclusions; they state no facts from which the Court can draw its own conclusion, yet Mr. Miller testified that the ore over the 1100 only averaged two feet, while

below the 1100 it averaged four and a half to five feet. (See pp. 726-7, Vol. II, Trans.) And again they testified to digging some trenches in the floor of the Clark stopes, and that in the trenches they found something like two feet of very good ore. But Mr. Cartwright, at page 827, Vol. III, Trans., testified that these trenches were immediately covered up by direction of Mr. Miller, who was then the resident manager. When our engineer, Mr. Ralson, who was accompanied by Mr. James P. Harvey, made an examination of the Clark stopes on the 20th or 21st of January, Mr. Cartwright went with them: he gave them access to the stopes; but Mr. Cartwright himself testified that he never called their attention to the fact that a trench had been dug in the floor of the Clark stopes, or what he had found there, and that he, under the direction of Mr. Miller, had covered up his find, thus making it impossible for our witnesses to ascertain whether or not they were testifying to the truth. (See p. 825, Vol. III, Trans., Cartwright's testimony.) A pretty practice to engage in in a court of equity! Especially by parties charged with fraud, and quite in keeping with their conduct during the progress of this trial, and during the occurrences of the events which gave rise to this controversy.

Mr. Ralston with Mr. James P. Harvey made an examination of the Clark stopes on the 20th or 21st of January. Their testimony upon rebuttal (see pages 1056 and 1076, Vol. III, Trans.) was to the effect that a few very small seams and stringers of ore were found in the Clark stopes. Mr. Ralston made a drawing of each face and of the roof. These drawings

are in evidence. These witnesses state facts; they detail what they saw, with character and value, and let the Court draw its conclusion as to whether or not it is merchantable ore.

The defendants are in this attitude before the Court: The answer admits that the 800 stopes were worked out. About the middle of paragraph 5 of the answer of the defendants we find the following language:

“Deny that the complainants had done but little work on the “said Ella and Missing Link lode claims further than to make “assays and doing development work on the same; but allege “the fact to be that the complainants had practically mined out “everything of value in the said Ella and Missing Link claims “above what is known as the 800 foot level.”

That is followed by the testimony of Mr. Culbertson, the assistant manager, to which attention has heretofore been called. It is also supported by the testimony of Mr. Patrick Clark and Mr. James P. Harvey. After the answer admitting, and after testimony of defendants' star witness had testified to it, and that testimony drawn from him by a direct question by defendants' counsel, we for the first time encounter an effort by the defendants to overthrow the whole thing, answer, testimony and all, and show that the ore up there was good enough to have put the complainants upon their guard. Evidently a desperate death struggle. We trust defendants may explain their attitude with reference to this matter to the Court, as to why they may mislead us with a sworn answer, and by direct testimony of their witnesses up to the time when the trial is practically closed, and then turn front entirely.

V. Was the Circuit Judge justified in concluding "that Complainants delayed an unreasonable time (eighteen months) in bringing this suit?"

The Circuit Judge evidently did not make a very careful examination of the evidence in the case. It appears very plainly that the fraud in this case was not discovered until about April, 1901, less than two months prior to the bringing of this suit. At page 523, Vol. II, Trans., Mr. Patrick Clark testified as follows, and this is all the testimony either for or against the proposition in the record, to-wit:

"Q. When did you first learn of the fraud that had been perpetrated upon you by Mr. Sweeny and Mr. Culbertson?"

"A. Some time last summer.

"Q. What time?"

"A. Oh, along in April.

"Q. You mean of this year, 1901?"

"A. Yes, sir."

Mr. Clark then testified that he had no knowledge of any fraud having been perpetrated upon him at the time when Mr. Culbertson invited him to visit the mine at Burke and that at that time he had no intention of going into the mine for the purpose of looking at the Ella, but for the purpose of determining whether the underground workings of the defendant companies were being extended into some ground belonging to the Poor-man Extension Company, in which he was a big shareholder. (See page 523, Vol. II, Trans.) It is true, Mr. Clark testified,

that Mr. Sweeny told him that he had found an ore body 900 feet high, 600 feet long and 5 to 6 feet wide, and that he had it on all the various levels from the 1200 up; that he told him this within three or four months after he bought the Ella, but at page 523, Vol. II, Trans., speaking of this matter, Mr. Clark testified (and this is all the testimony there is on this question) :

“Q. Where did he say—on what part of the claims did he “say?

“A. I asked him where it was, and he said it was in the “O’Neill ground. That of course aroused my curiosity as to “whether it might go into the Poorman Extension, and I asked “him.

“Q. What did he say about that?

“A. He said that it did not go in that direction, that it made “a turn and went around through the O’Neill ground.”

Nor does it appear from any of the evidence in the case that Mr. Patrick Clark knew then or had any intimation that this ore body had been discovered prior to, or was known of by Messrs. Sweeny and Culbertson, at the time of the sale of the Ella. If it had been made thereafter, it would not have been fraudulent. Is two months an unreasonable time to delay in bringing suit for the cancellation of a conveyance after the discovery of the fraud? The statute of limitations of the state of Idaho allows three years in law cases to bring suits in cases of fraud. See Sec. 4054 Revised Stat., Idaho. *Kelly v Boettch*

Within that period of time Mr. Patrick Clark was required to attend to the following details with reference to the bringing of

this suit: He had to consult with and employ counsel; he had to satisfy his counsel of the sufficiency of his evidence, and his counsel had in turn to marshal the facts, examine the law, prepare the pleadings, send them to Moscow for filing, have the writ of subpoena issued, returned and filed. Is two months an unreasonable time in which to do that? No intervening rights of innocent parties grew up in the meantime. No change in the condition of the property or in its ownership took place. The defendants in the meantime were extracting large quantities of ore and reaping splendid profits from the property.

In *Michaud vs. Girod*, 4 How., 503, which was a case of actual fraud committed by trustees of real estate against their *cestui que trust*, a bill filed 36 years after the commission of the fraud was held not to have been too late. In that case, Mr. Justice Wayne, at page 560, used this language.

“In a case of actual fraud courts of equity give relief after a long lapse of time, much longer than has passed since the executors in this instance purchased their testator’s estate. In general, length of time is no bar to a trust clearly established to have once existed, and where fraud is imputed and proved, length of time ought not to exclude relief * * * There is no rule of equity which includes the consideration of circumstances and in a case of actual fraud we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within 30 years after it has been discovered or becomes known to the party whose rights are affected by it.”

So in *Prevost vs. Gratz*, 6 Wheat., 481, it was said by Mr. Justice Story:

“It is certainly true that length of time is no bar to a trust clearly established, and in a case where fraud is imputed and proved length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practiced is rather an aggravation of the offense and calls more loudly upon a court of equity to give ample and decided relief.”

To the same effect, see *Baker vs. Whiting*, 3 Sumn., 475;

Allore vs. Jewell, 94 U. S., 506.

Meador vs. Norton, 11 Wall., 422.

See also *McIntire vs. Pryor*, 173 U. S., 38, which was a case where the Court held that a gross fraud had been committed dispossessing defendants of their property. The Court held that in view of the peculiar circumstances of the case a fraud so glaring, the original and persistent intention of McIntire through so many years, to make himself the owner of the property, *the utter disregard shown of the rights of the plaintiff as well as of the mortgagee, and the fact that a decree could do no harm to any innocent person*—those facts do away with the defense of *laches* and demand of the Court prompt and immediate relief for the complainant.

The Buffalo Hump Company sold the property, which we charge was obtained from us by fraud, to the other defendant, the Empire State-Idaho Mining & Developing Company, on January 17th, 1901. The answer, in the latter end of paragraph 10 (see page 48, Vol. I, Trans.), admits:

“Defendants admit that the consideration paid by the Empire State-Idaho Mining & Developing Company to the Buffalo Hump Mining Company for the conveyance of the Ella and Missing Link lode claims was fully represented by transfer of shares of stock of the Empire State-Idaho Mining & Developing Company to the Buffalo Hump Company.”

So that no innocent parties can claim to be injured.

Billings v. Aspen M. & S. Co., 2 C.C. 263.

It is shown by the testimony of Mr. Sweeny (see pages 474-5, Vol. II, Trans.) and is admitted by the answer (see pages 30, 37, Vol. I, Trans.) that Mr. Sweeny was the general manager of the Buffalo Hump Company and of the Empire State Company at the time, and at all times since the transfer of the Ella and Missing Link to the Buffalo Hump Company; that Edwin Packard was the president of both companies at all such times; that Mr. Culbertson was the assistant manager of both companies at practically all of such time; and that the board of trustees was practically the same all the time. Therefore no change of ownership has taken place in these properties, at least not since we have discovered the fraud. The new crowd that gave up stock in their company to the old company, in which they, too, were stockholders, had notice of the fraud. Their general manager, Mr. Sweeny, perpetrated the fraud upon us. Their president, Mr. Packard, was the president of the Buffalo Hump Company.

In the case of the Distilled Spirits, 11 Wall., 356, this rule is announced by the Court (we quote from the syllabus):

“The rule that notice to the agent is notice to the principal

“applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in all prior transactions and present to his mind at the time he is acting as such agent, provided it be of such a character as he may communicate to his principal without breach of professional confidence.”

In *McIntire vs. Pryor*, 173 U. S., the Court approves the case of *Distilled Spirits* and amplifies it in these words:

“Much more is this the case where the fraud is committed by the agent himself in obtaining title to the property for the benefit of his principal.”

Thompson, Corporations, Vol. IV, Secs. 5200, 5222, 5228.

Smith vs. South Royalton Bank, 76 Am. Dec., 179.

A particularly strong case on this point is *Cox et al. vs. Pierce et al.*, 112 N. Y., 641.

In the case of *Neblett vs. McFarland*, 92 U. S., at page 105, Mr. Justice Hunt announces these principles:

“In *Gatley vs. Newell*, 9 Ind., 572, it is said: ‘The party defendant is not bound to rescind until the lapse of a reasonable time after discovering the fraud. Hence the parties cannot be placed *in statu quo* as to time.’

“Parties engaged in a fraudulent attempt to obtain a neighbor’s property are not the object of the special solicitude of the courts. If they are caught in their own toils, and are themselves the sufferers, it is a legitimate consequence of their violation of the rules of law and morality. Those who violate these laws must suffer the penalty.”

VI. The real condition of the Cross-cut and Drill Hole No. 2 and what was found in them.

Upon the question of the size and value of the ore body found in the cross-cut, defendants attempted to make a great point by making a challenge to us, *after the evidence was all in on both sides*, to have the Court send an umpire and advise the Court as to whether there was not a slab of barren rock standing upon the floor of that cross-cut at the point where the cross-cut is supposed to have cut the ore body, and that being the case defendants claim that this should be proof conclusive that no ore of any consequence was found in the cross-cut. We opposed that course being taken upon the ground that if our testimony upon the subject was false the defendants had it in their power to prove conclusively what ore was found in the cross-cut and that the condition of the floor of that cross-cut at that time was not conclusive at all of the size of the ore body penetrated by the cross-cut. Defendants did not call either Mr. Sweeny, general manager, or Mr. Culbertson, his assistant, or Mr. Miller, their chief engineer, nor did they show or produce the progress map showing the progress and the character of the work month by month, but they called one witness, a man by the name of Stone, and there they stopped. We contend that the voids extending indefinitely above the floor of the cross-cut and indefinitely downward (with the exception of a small slab found in the floor) speak more powerfully and more eloquently as to what was found in that cross-cut than the testimony of all the witnesses that could be called on either side.

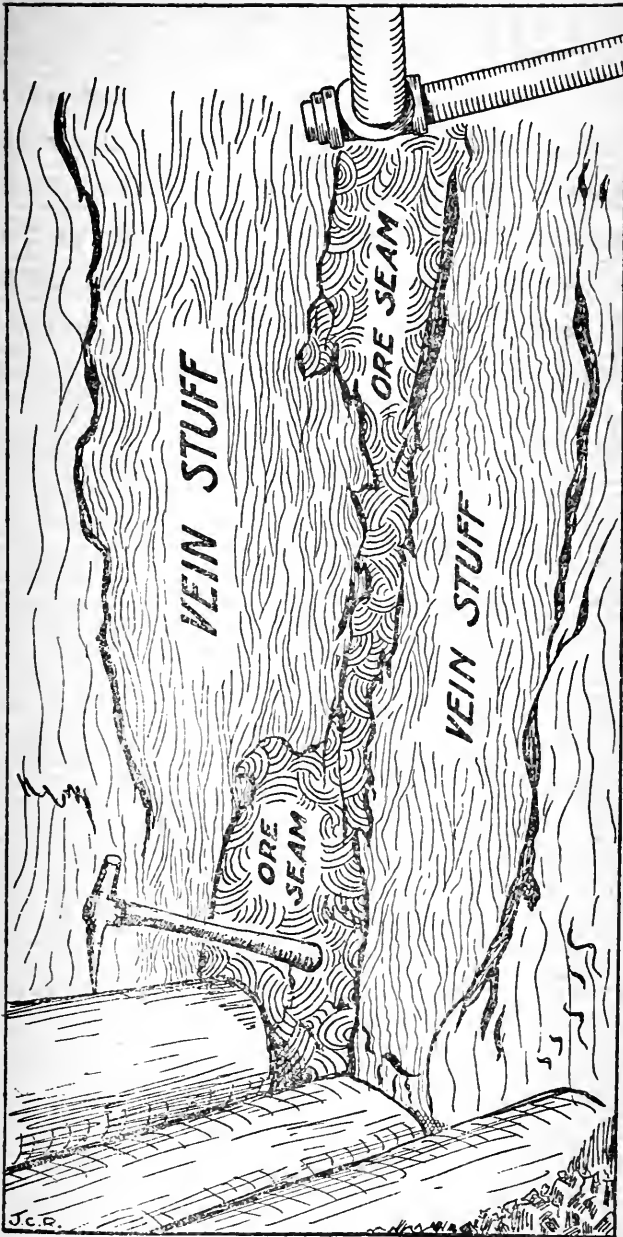


FIG. 2: PANTOGRAPHIC REPRODUCTION
OF PLAINTIFF'S EXHIBIT NO SHOWING
WEST FACE OF EAST DRIFT.

The annexed figure 2, a pantographic reproduction of plaintiff's exhibit No. 53, showing west face of the east drift, illustrates a freak of nature that occurs not unusually in mining. Here is an ore seam which, judging from the pick handle extending partially across it and judging from other surrounding objects taken by the photograph, must be at least two feet in width at its base. Three feet above that point it narrows down abruptly to a very few inches. The annexed figure 3 represents

FIG 3: FIG 2 INVERTED-ILLUSTRATING HOW ORE SEAM CAN PINCH AT FLOOR OF A DRIFT.

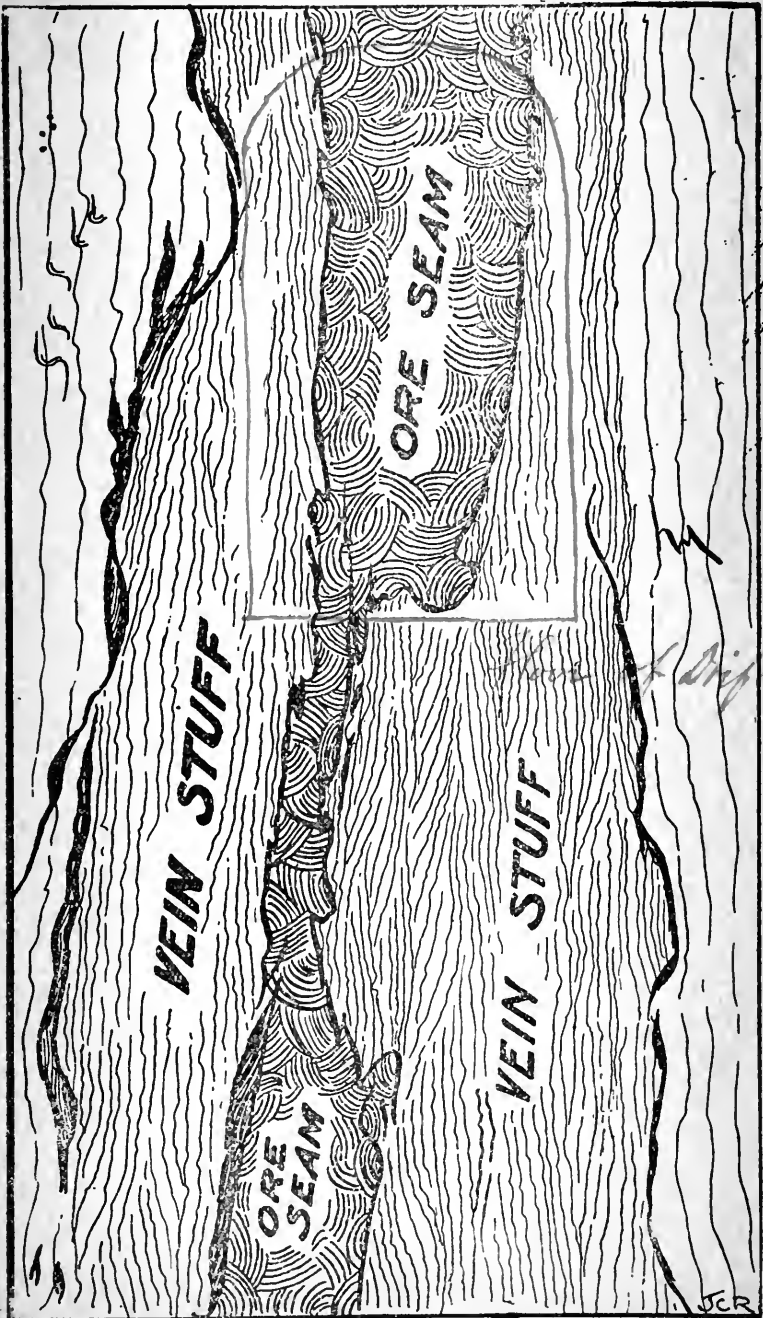


figure 2 inverted, and illustrates how an ore seam can pinch at the floor of the drift. Figure 3 shows a condition that might have existed at the place where the ore was encountered on this cross-cut. Mr. Ralston testified that he took the photograph, of which this is a reproduction, in the vicinity where it is claimed by the defendants this barren slab of rock was found in the floor of the cross-cut. Being a reproduction, we do not claim these figures to be official; they are used by us only to illustrate our argument. Mr. Culbertson's testimony strengthens our theory with reference to this matter very materially. At p. 218, Vol. I, Trans., he says:

"In other places we find where a diamond drill hole might penetrate a body of ore, and within ten feet of that point, there would be no ore."

As against this barren slab of rock in the floor of the cross-cut, upon which defendants put so much reliance and which we think we have demonstrated to the Court, simply results from the ore seam pinching at that point, we have the testimony upon our side as to the size of the ore body found there at the time the cross-cut was driven of Mr. Thomas Jay, foreman of defendants at the time the work was done (see page 426, Vol. I, Trans.), of Mr. Amos Jay, shift boss (see pp. 566-9, Vol. II, Trans.), of Mr. Ralston, who testified that he found pieces of clean ore on the four corners at the point the cross-cut intersected the vein, and who measured the voids above and below the cross-cut (see pp. 613, 623, 630, Vol. II, Trans.), of Mr.

Porter, an engineer, who measured the size of the voids at the point the ore was struck in the cross-cut where it had been stoped out above the cross-cut on the drift extending in both directions from the cross-cut and from within a few feet of the floor of the cross-cut, extending downward several levels (see pp. 587-602, Vol. II, Trans.), also of Mr. Cartwright, defendant's witness and foreman; all to the effect that the voids both in the stopes and the drifts were from 6 to more than 12 feet in width.

It is not strange, however, that defendants should take this position with reference to the size of the ore body in the cross-cut. They took a similar position with reference to the size of the ore body struck in drill hole No. 2 immediately within the Ella and Missing Link east lines. They denied the size of the ore body. Mr. Culbertson insisted that he did not consider it much of a strike. (See page 272, Vol. I, Trans.) He does not say how big it was, nor what was found there, but he gives simply his opinion. He does say, however, that Mr. Sweeny was pretty enthusiastic over it, though Mr. Sweeny, when on the stand, testified that he did not consider it of any consequence. However, when the foreman of the diamond drill crew was called (Mr. N. H. Wright)—*and he was called by the defendants*—we found our witnesses had been pretty conservative in their statements of the size of the ore body. Mr. Wright testified (see page 797, Vol. II, Trans.):

“Q. Where is what you found?”

“A. Well, here is ‘ore, ore mixed, 79-94.’”

“Q. What do you mean by that?”

“A. 79 to 94 feet.

“Q. 79 to 94 feet would be 15 feet?”

“A. Yes.

Q. 15 feet of ore, you met on the 15th?

“A. Ore mixed is what it is.”

And at page 798 the same witness testified from a record that was made at the time the ore was struck, saying:

“Q. Now turn to the 13th day of August and will you give ‘the reporter the record there; read it just as you have it?’

“A. It is ‘Knight, day shift, sixteen feet.’ That leaves the ‘hole at 94 feet, and from 79 to 94 ‘ore mixed.’”

And again at page 798, Vol. II, Trans.:

“Q. What was the result of that in this core; how much ore “of whatever grades was there, just tell us?”

“A. Well, of course, this record I have here was made “right after the shift, after it was reported, but after examining “the core and examining the cuttings, we determined *there was* “*about six feet of good concentrating ore*, and the rest in the “latter part was ore with seams in it.”

And again at page 799, Vol. II, Trans.:

“Q. When you speak of that as concentrating ore, about how “good was that ore?”

“A. Well, really, *I don't know whether I can answer that* “*question. That would be determined better by assaying a* “*sample that came up; I considered it a pretty good strike,* “*though, that is the way I felt about it at the time, but as to the* “*quality it was hard for me to determine.*”

Mr. MacDonald testified that they cut about 6 feet of solid galena, as the core showed. (See page 287, Vol. I, Trans.) Mr. Thomas Jay, foreman of the Buffalo Hump Company, at the time the drift was run which encountered the ore at the point drill hole No. 2 penetrated it, testified that it was four feet of solid shipping ore at that point, and that there was concentrating ore on both sides of the drift, that it was wider there than at any other place. He also testified that the solid streak (the clean ore), while only four feet in width at right angles, *was about six feet measured at the angle at which the drill struck, thus* corroborating Mr. MacDonald as to the size of the solid ore found in the drill hole. (See pp. 439-40, Vol. II, Trans.)

Mr. Amos Jay, the shift boss of the Buffalo Hump Company, fully corroborates Mr. Thomas Jay (see pp. 567-72, Vol. II, Trans.) It will be observed that Mr. Thomas Jay wrote down in a little book, that is in evidence in this case, the size of the drift where the drill hole penetrated the ore, also the date when the drill hole was encountered by the drift. Mr. Porter examined the voids at the point where the drill hole penetrated the ore, and he testified that the drift was between 10 and 15 feet wide at that point, and that the stopes above and below were of the same size. (See pp. 594-5, Vol. II, Trans.) Mr. Ralston fully corroborates Mr. Porter. (See page 623, Vol. II, Trans.) These same witnesses also testified that at the time of their first examination all the ore had not been mined out immediately below the drill hole, that they took samples within

three feet of where the drill hole penetrated and that it ran very high. (P. 593, Vol. II, Trans.) They testified that afterwards upon a second examination the ore was all mined out underneath the drill hole practically down to the 1300. The defendants brought no witnesses to contradict or to deny the testimony of complainants' witnesses upon this point except the opinions expressed, *supra*, by Mr. Sweeny and Mr. Culbertson to the effect that the strike did not amount to much. Here, then, is this splendid showing all within our ground made by the defendants unlawfully, by trespasses committed at those points in the mine, where we could not discover it, had we attempted to do so, all suppressed from us at the time of the purchase, and the Court below held this to be a fair transaction untainted by fraud.

VII. Complainants contend that they are entitled to a decree upon the admitted facts.

We earnestly urge that, upon the admitted facts, we are entitled to a decree cancelling the sale. We insist as a matter of law that the defendants, having obtained their knowledge of our property fraudulently and unlawfully without our knowledge and without our consent, and having purchased from us under those conditions, it was their duty to make full disclosures of the facts. It was their duty to advise us of the size of the ore body struck by the drill within our ground and without our permission on the east end of the Ella, because the knowledge which they had of the transaction was not equally accessible

to us and was obtained by them unlawfully. It was their duty also to make full disclosures to us at the time or prior to the purchase of the size and quality of the ore body struck within our ground upon the west end of the Ella by the cross-cut, because the knowledge they had of the matter was not equally accessible to us, and because it was obtained by them unlawfully. The rule of law which allows them to prospect their own ground at depth within a few inches of our line when doing so in the regular course of mining, and determine the size of an ore body at that point, and then prospect their ground at the other end of our ground and determine the size of the ore body at that point, and then form an opinion as to the size and continuity of the ore body passing between those two points through our ground, before they purchase from us, is the very furthest limit to which the rule may be carried and approaches very near to the danger line, if it does not cross it. Even such conduct would shock the conscience of an honest man as being contrary to fair dealing. Will anyone claim that it is not wrong, unjust and dishonest for one to prospect his neighbor's ground at depth under cover of a big mountain, simply because he found our workings there the only means of access to the point at which the trespass was committed being within the private and undisputed property of the trespasser? And having satisfied himself of the value, not by one trespass, but by still another, the latter having no connection and being in no wise dependent upon our works, having made assurance doubly sure, armed with this knowledge unlawfully obtained, knowing that his

victim has no knowledge on the subject, with no means of acquiring it, and knowing that his victim is laboring under the misapprehension that he knows as much—yes, more—than the intending purchaser about the value of the property, and under these conditions makes the purchase? Yet this is exactly what the record in this case shows the defendants have done; it is what they admit having done; it is exactly what the Circuit Judge found they did.

What is the difference between the facts as we have now detailed them and as they are admitted to exist in this record and the following case: Suppose Mr. Patrick Clark and Mr. B. C. Kingsbury, being partners, owned the "Keep Cool" mine; that Mr. Kingsbury was in New York and Mr. Clark was in Spokane; that a big strike should be made on the mine and Mr. Clark should wire to Mr. Kingsbury at New York as follows: "Big strike on Keep Cool; mine worth a million dollars; don't sell stock." Suppose that the telegraph operator that took this message from the wire should step across the street with the telegram to the office of Mr. Sweeny and show it to him, and that Mr. Sweeny armed with this knowledge should immediately rush to the Fifth Avenue Hotel, ask Mr. Kingsbury if he wanted to sell his stock in the Keep Cool, make no false representations—in fact, no statements of any kind whatsoever—and that Mr. Kingsbury should say: "Yes, I will sell it for \$4000," and that Mr. Sweeny should simply give him a check taking the stock and closing the deal, and then suppose that half an hour later the telegram from Mr. Clark should be delivered to Mr.

Kingsbury, will anyone say that Mr. Kingsbury had not a cause of action against Mr. Sweeny to recover back that stock? Where is the difference in principle between the two cases?

Again, suppose that Mr. Clark owns the Bonanza mine, a mere prospect; that Mr. Sweeny without his knowledge should send a gang of men down to the bottom of the shaft, that had no ore in it at all, that in fact had been abandoned by Mr. Clark, and that he should run a diamond drill through the vein, strike a splendid body of ore at a distance of 50 feet away from the bottom of the shaft. Armed with that knowledge thus unlawfully obtained, suppose he should approach Mr. Clark, make no misrepresentations at all, but simply ask him if he cared to sell the Bonanza, and if so to put a price upon it. Mr. Clark put a price of \$4,000.00 on it, Mr. Sweeny gave him a check and the deed passed. Will any one say that Mr. Clark had no cause of action upon those facts to recover back his property? Where in principle is there any distinction between this case and the admitted facts of the case presented to the Court?

VIII. Complainants should have been awarded their expenses going to New York to take the testimony of Mr. Sweeny.

Complainants should have had the expenses of going to New York to take the testimony of Mr. Charles Sweeny allowed them. The affidavits of Mr. Stoll, Mr. Gordon and

Mr. MacDonald at pp. 135-9, Vol. I, Trans., show the necessity for Mr. Patrick Clark, Mr. Stoll and Mr. Gordon going to New York. They also show the expenses incurred in going. There is no evidence in the record in opposition to this. It should therefore be taken as conclusive. Notice was given the other side that the matter would be called for decision by the Court at Boise on March 31st. (See p. 137, Vol. I, Trans.) It was brought to the attention of the Court and submitted, as will appear by the Court's opinion. (See p. 166, Vol. I, Trans.) The Court neglected to decide it, holding that he could not do so from the proofs offered, and that it was not properly presented. As we were unable to offer any further proofs, nor put it in any other shape, and as the proofs offered by us were clear and conclusive, we will stand upon the proofs made and take the decision of this Court as to the correctness of the ruling of the Circuit Judge. The Circuit Judge made an order *on defendants' motion* allowing us our expenses in going to New York upon this occasion, but did not determine the amount. (See pp. 127-8, Vol. I., Trans.) That order was not excepted to by the other side, and therefore it is final.

IX. Some Additional Authorities.

As to Mr. Sweeny's power to bind the defendants for the fraud charged in this case, he being their General Manager, see:

IV Thompson, Corporations, Sec. 5303, and authorities cited.

To the point that while it is the rule that a vendee who has information of a mine on the land of another of which the latter is ignorant, is under no legal obligation to disclose, *yet a very little is sufficient to affect the application of this principle, and statements ordinarily regarded as expressions of opinion will be considered statements of fact*, see:

Stackpole vs. Hancock, 45 L. R. A., 814.

Livingstone vs. Peru Iron Co., 2 Paige, 390.

Morgan vs. Dinges (Neb.), 36 N. W., 544.

Kelly vs. Sheldon, 8 Wis., 107.

Swim vs. Bush, 23 Mich., 99.

Prescott vs. Wright, 4 Gray, 461.

Fairbault vs. Sater, 13 Minn., 210.

Hedin vs. Minn. Medical & Surgical Inst., 35 L. R. A., 430.

Wright vs. Wright, 37 Mich., 55.

Dunn vs. White, 63 Mo., 181.

Newburyport Ins. Co. vs. Oliver, 8 Mass., 409.

To the point that a tender is not necessary to be either made or kept good in a suit such as this to set aside a contract for fraud where the bill shows or the proof is, that defendant is

indebted to the complainants in a greater sum than that paid by the defendant, and the bill asks an investigation and statement of accounts existing between the parties, see:

Watts vs. White, 13 Cal., 321.

Higby vs. Whittaker, 8 Ohio, 198.

Hills vs. Nat'l Albany Exchange Bank, 12 Fed., 95.

Billings vs. Aspen M. & M. Co., 2 C. C. A., 263.

The appellants respectfully insist that they are entitled to have the decree of the Circuit Court reversed and a decree entered in their favor.

Respectfully Submitted,

STOLL & MACDONALD,

W. W. WOODS,

M. J. GORDON,

Solicitors for Appellants.

NO. 870

—IN THE—

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

PATRICK CLARK, BENJAMIN C.
KINGSBURY, JAMES P. HARVEY,
and A. G. KERNS, Administrator of
the Estate of James Clark, Deceased,
Appellants,

vs.

THE BUFFALO HUMP MINING
COMPANY (a corporation), and THE
EMPIRE STATE-IDAHO MINING
& DEVELOPING COMPANY (a
corporation),

Appellees.

FILED

OCT -7 1902

Upon Appeal from the United States Circuit Court
for the District of Idaho, Northern Division.

Brief of Appellees

W. B. HEYBURN,

Solicitor for Appellant.



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Appellees.

No. 870

Brief of Appellees

We are served with brief of appellants in this case, which opens with a "statement," but it does not seem that the statement is in conformity with the requirements of Paragraph 2 of Rule 24 of this Court, in that the statement does not purport to set out the questions involved in the manner in which they are raised, but disregards the issues made by the pleadings,

both as to form, substance and manner of presentation, and is intermingled with argument to such an extent that the specific questions involved on the appeal can not readily be determined.

We therefore, under paragraph 3 of Rule 24, present the following statement of the case.

STATEMENT OF CASE.

This is a suit brought by appellant for the cancellation of a deed and to compel the re-conveyance of an undivided four-fifths interest in the Ella and Missing Link lode claims, situated near the town of Burke, in Shoshone County, Idaho. The complainant also asks for injunction, a receiver and an accounting.

Appellants base their claim to the relief asked on the allegation that the deed was procured from them by the defendant, Buffalo Hump Mining Company, through its representative, Charles Sweeny, under such circumstances as would authorize a court of equity to annul the transaction and cancel the deed, or direct reconveyance. It is alleged that the defendant, Empire State-Idaho Mining & Developing Company, purchased with knowledge of the alleged wrongful acts on the part of Sweeny.

The facts as they appear from the record are that from about 1895 the mining claims known as the Tiger and Poorman had been operated together under the ownership of the Tiger & Poorman Consolidated Mining Company, the grantor

of the defendant, the Buffalo Hump Mining Company, under the management of F. R. Culbertson, and that since the sale of them by that company they have been worked by the defendants. These mines had been worked separately from 1885 to 1895, and the development upon them was very extensive. From 1887 to 1895 one of the plaintiffs, Patrick Clark, was the General Manager of the Coeur d'Alene Silver Lead Mining Company, the owner during that time of the Poorman claim, and had sole charge of its development. During the time while he was so in charge, he and some of his personal friends secured title to a fractional portion of the claim lying to the east of the Poorman claim and covering a space on the ledge between the Poorman and the O'Neil claims, which was called the Ella and Missing Link Fractions. It also appears that the ledge passes from the Poorman claim eastwardly into the Ella and Missing Link Fractions and beyond into the O'Neil.

During the time that plaintiff Patrick Clark was manager of the Poorman mine he used the work and development on that mine as a means through which to explore and work the Ella and Missing Link claims for the benefit of himself and his partners.

The plaintiffs allege that long prior to the 13th day of October, 1899, they were the owners of an undivided four-fifths interest in the Ella and Missing Link lode claims, and that the other undivided one-fifth interest in the claims was

owned by F. R. Culbertson, who was a tenant in common with them. That the Ella and Missing Link claims were contiguous to each other, and were bounded on the east by the O'Neil, and on the west by the Poorman claim. That Charles Sweeny was agent and General Manager for defendant, Buffalo Hump Mining Company, and the Empire State-Idaho Mining & Developing Company. That both of the corporations defendant were organized under the laws of the State of New York.

That Charles Sweeny and F. R. Culbertson were citizens and residents of the State of Washington; that Culbertson was the Superintendent, under Sweeny as General Manager, of the Buffalo Hump Mining Company, and was in charge of the operations of the concentrating mill and the mining property of the defendants.

In the fourth paragraph of the complaint it is alleged that one of the plaintiffs, Patrick Clark, was the agent for all of the other complainants, and as such agent was authorized to manage and conduct the mines and mining interests in which they were tenants in common, including the Ella and Missing Link claims, with full power and authority on his part to bargain for the sale of the same.

That during the summer and fall of 1899, the defendant, Buffalo Hump Mining Company, was the owner of the Tiger and Poorman mines. That these mines had been worked for many years and that at that time they were practically worked out to a depth of about sixteen hundred feet. That the Ella

and Missing Link lode claims both lay east of the Poorman claim, high up on the mountain, more than 1200 feet above the level of Canyon Creek, and that the apex of the vein on the Ella and Missing Link claims was about 2800 feet above the lower workings of the Poorman mine.

The complaint alleges that in the summer and fall of 1899 the defendant, Buffalo Hump Mining Company, was mining extensively upon the Tiger-Poorman mine and had a combination shaft thereon, which started downward from the level of Canyon Creek, and was sunk to a depth of 1600 feet from the surface, and had exclusive possession of the shaft and all the workings connected therewith, and that no person, other than the Company, were *entitled* to access to the workings or to any information concerning the workings, or the condition, value, or extent of the ore reserves therein. That the drifts and stopes throughout the Tiger and Poorman mines, from said shaft to the Ella line, were more than two thousand feet in length and were winding and circuitous in their courses.

Plaintiffs allege that Culbertson was their agent and representative and had knowledge of the existence of valuable ore bodies within the Ella and Missing Link claims which it was his duty to communicate to them by reason of an alleged agreement on his part to do so; that Culbertson conspired with Sweeney to withhold all information as to the existence of ore bodies in the ground in controversy from the plaintiffs, in order that Sweeney might be able to purchase the Ella and Missing Link claims from the plaintiffs at a less price than he

would be able to purchase them for if they had knowledge of the alleged existence of valuable ore bodies therein.

In the sixth paragraph of the complaint they allege that in 1896 they conveyed a one-fifth interest in the Ella and Missing Link claims to Culbertson for the consideration, and with the understanding, that should the workings of the Poorman mine disclose any ore bodies so near the Ella mine as to render it probable that the ore bodies extended through the Ella claim, he should advise the plaintiffs of that fact and that the performance of these services was the only consideration that Culbertson was to pay for the one-fifth interest. It is alleged that this arrangement was known to the defendant, the Buffalo Hump Mining Company, at the time it purchased the plaintiffs' interest in the Ella and Missing Link claims.

Complainants allege that Culbertson knew of the existence of valuable ore bodies in the Ella and Missing Link claims, and that he suppressed and withheld such information from plaintiffs and thereby they were induced to sell their interests in the claims for a less price than they would have demanded had they been advised by Culbertson of such facts.

Complainant then alleges that about the 13th of October, 1899, Charles Sweeny, representing himself to be the General Manager of the Buffalo Hump Mining Company and also the General Manager of the Empire State-Idaho Mining & Developing Company, both defendants herein, entered into negotiations with Patrick Clark, one of the complainants, in regard to the purchase of the undivided four-fifths interest in the Ella

and Missing Link claims, and that he falsely and fraudulently, and for the purpose of cheating and defrauding the complainants, represented to Patrick Clark that he had then purchased for the Buffalo Hump Company all of the interest of Culbertson in the Ella and Missing Link claims for the sum of five hundred dollars; and that the Buffalo Hump Company was then the owner of an undivided one-fifth interest purchased from Culbertson and was a tenant in common with the plaintiffs. That Sweeny then offered to pay \$4,000 to the complainants for their undivided four-fifths interest in the claims, and that he falsely and fraudulently represented to Patrick Clark, who was acting for the plaintiffs, that the Ella and Missing Link claims were no good and had no value as mining claims, but that he and the Buffalo Hump Company were desirous of acquiring the full ownership of all the claims in which the Company had any interest, including the Ella and Missing Link claims, for the purpose of forming the basis of a new corporation and making a big showing in the shape of surface ground, and that while the Ella and Missing Link claims were of no value as mining claims they would be of some value in the furtherance of said new corporation.

Complainants then charge that Sweeny, representing the Buffalo Hump Company, for the purpose of cheating and defrauding the complainants, suppressed the information from them that a large body of ore had been struck within the limits of the Ella claim by the Buffalo Hump Company, under his management and that of Culbertson, without the knowledge

or permission of the complainants, and in a secret, unlawful and clandestine manner. That the discovery of ore gave to the Ella and Missing Link claims an actual value of more than five hundred thousand dollars, and that such fact was well known to Sweeny and Culbertson, and to defendant, Buffalo Hump Mining Company, and was unknown to complainants.

Complainant then alleges that Culbertson was a tenant in common with plaintiffs, and was also Superintendent of the Buffalo Hump Mining Company, and that he conspired with Sweeny for the purpose of cheating the complainants and falsely and fraudulently represented to the complainants that he had sold his interest in the Ella and Missing Link claims to the Buffalo Hump Company for \$500.00, and represented to the complainants that the mining claims were no good; that no ore had been discovered under ground either in the Ella or Missing Link claims, or so near to them as to render it probable that the same extended into or through them, and that there was no value in the said mining claims. That the fact that Culbertson made these statements to the complainants was known to Sweeny, and by him and Culbertson such statements were known to be untrue.

Complainants then state they relied upon the representations of Sweeny and Culbertson, and believing the statements made by them to be true, and having no means of testing and finding out the value of the Ella and Missing Link claims, because of the fact that the representations were made at Spokane, in the State of Washington, and the claims were situated

more than one hundred and forty miles distant therefrom, and because of the fact that the complainants had *no authority* to make a personal inspection through the underground works of the Buffalo Hump Mining Company upon the claims, or otherwise, complainants accepted the price of \$4,000 offered by Sweeny on behalf of the Buffalo Hump Mining Company, and on the 14th day of October, 1899, in consideration of \$4,000 complainants executed *and delivered* a deed to the Buffalo Hump Mining Company for an undivided four-fifths interest in the Ella and Missing Link claims.

The complainant then alleges that long prior to making the offer by Sweeny to the complainants to buy their interest, Sweeny, as General Manager of the Buffalo Hump Mining Company, had, by means of diamond drills and drifting, penetrated the Ella and struck a large and valuable body of ore therein, which was a continuation of the Tiger-Poorman vein, and which had its apex within the limits of the Ella and Missing Link lode claims, and that this was known to *Culbertson* and unknown to complainants.

The complainant alleges that Culbertson had not sold to the Buffalo Hump Mining Company for \$500.00, and had not sold his interest at all at the time he made the representation to the complainants, but complaint alleges, on information and belief, that shortly after the Buffalo Hump Mining Company had purchased the complainants' interests for \$4,000.00, they purchased Culbertson's interest for \$75,000.00.

The complaint then alleges that the Buffalo Hump Mining Company took the property with full knowledge of the alleged fraud. They then charge that the mine is worth one million dollars, and that the defendants have extracted \$450,000.00 in values from it.

The complaint then charges that the Empire State Company is insolvent, and that its affairs are in a bad way.

THE ANSWER.

The answer denies all of the allegations of cheating and defrauding on the part of Culbertson and Sweeny, or either of the defendants.

Denies that the complainants had done little or no work upon the Ella and Missing Link claim further than to make assays and do development work thereon, but allege the fact to be that the complainants had practically mined out everything of value in the Ella and Missing Link claims above the 800 level, said level being 1,100 feet below the apex of the vein, and allege that the complainants had taken large quantities of ore therefrom, sold and received the proceeds thereof, and that they had mined within the ground in controversy for more than five years and were fully conversant with all of the facts touching its value, present, past and prospective.

Denies that any of complainants, or any person acting for them, at any time, by inquiry, request, or other means, ever

sought to enter, inspect, investigate or obtain knowledge as to the character, value, extent or direction of any workings or exploration in the Ella or Missing Link claims through the combination shaft, or otherwise, and allege that all of said workings were at all times open and subject to the inspection of complainants, or any of them.

The defendants disclaim any knowledge as to the contract which complainants allege they made with Culbertson.

Complainants not having seen fit to make either Sweeny or Culbertson defendants, the two defendant corporations could not answer of their own knowledge for Culbertson as to the contract, but have answered on the information received from him, and on such information deny that any such contract was made with Culbertson as is alleged in the complaint.

In the sixth paragraph of the answer the defendants deny having any knowledge whatever as to the conditions, terms or circumstances relative to the making of the conveyance to Culbertson or as to his relations to the complainants, and allege that neither of the defendants ever heard, or knew, of the alleged transactions between complainants and Culbertson until the commencement of the suit. The alleged statements as to the representations made by Sweeny to Clark in regard to the value of the property, are fully denied in the answer, and the denial sustained by the proofs offered by the defendants.

They deny that the property had any value above the price paid therefor at the time complainants sold it, and deny that it has now any such value as claimed by complainants.

ALLEGATIONS IN THE COMPLAINT NOT PROVEN.

At the trial the complainants failed to prove the allegation in the fifth paragraph of the complaint, that they had done but little work upon the Ella and Missing Link lode claims further than making the discovery and doing the necessary development work thereon.

They failed to prove the allegation contained in the seventh paragraph of the complaint that by reason of the work and development done within the limits of the Ella lode claim, without the permission of the plaintiffs in a secret, unlawful and clandestine manner, there had been given to the Ella and Missing Link lode claims an actual market value of more than \$500,000.

Plaintiffs failed to prove the allegations contained in the eighth paragraph of the complaint, that Culbertson had falsely and fraudulently represented to the complainants that he had sold his interest in the Ella and Missing Link lode claims to the Buffalo Hump Mining Company, at the solicitation of Charles Sweeny, for the sum of \$500.

Complainants failed to prove the further allegation in the eighth paragraph of the complaint, that Culbertson represented to the complainants that the Ella and Missing Link claims were no good, or that there was no ore discovered underground, either in the Ella and Missing Link claims, or so near the Ella line as to be probable that the same

extended into or through the Ella, or that there was no value to the said claims.

Complainants failed to prove the further allegation contained in the eighth paragraph of the complaint, that on the 13th day of October, 1899, the Buffalo Hump Mining Company had, by means of drifting, penetrated into the Ella and had found a large and valuable body of ore therein, which was a continuation of the Tiger-Poorman vein, or that at the time of making the conveyance in October the works of the defendant, the Buffalo Hump Mining Company had gone beyond the limits of the Ella into the Missing Link claims.

The complainants failed to prove the allegation, set out in the ninth paragraph of the complaint, that at any time the Buffalo Hump Mining Company purchased the interest of Culbertson in the Ella and Missing Link claims for a consideration of more than \$75,000, or for any consideration in excess of \$1000.

The complainants failed to prove the allegation contained in the fifteenth paragraph of the complaint, that the Ella and Missing Link claims are worth more than a million dollars, or any sum in excess of the sum paid to the complainants therefor, or that the defendants had extracted ores of the value of \$450,000, or of any considerable value, therefrom.

Complainants failed to prove the allegation contained in the fifteenth paragraph of the complaint, that the

Buffalo Hump Mining Company was practically insolvent, or that the defendant the Empire State-Idaho Mining & Developing Company was possessed of but little property of value beyond the Ella and Missing Link claims, or that said property as it had was involved in litigation of a complex character, or that it was insolvent.

We have denominated the foregoing allegations as not proven because they have not only not been sustained by any evidence, but they have been shown by the testimony of plaintiffs to be untrue.

In addition to such allegations, the complainants have utterly failed to sustain every material allegation upon which they seek to recover, as will be more particularly and fully pointed out hereafter in the argument.

ARGUMENT.

From the foregoing statement as to the facts, it will appear that the issues in this case are resolved down to—

1st. Did the complainants have knowledge or means of knowledge as to the value of the Ella and Missing Link claims at the time of their negotiations and sale to the Buffalo Hump Company?

2nd. Were they excluded by circumstances or as a fact from obtaining full information as to the value of the Ella and Missing Link claims prior to, or at the time of, the negotiations and sale?

3rd. Did either of the defendants, or any person authorized to speak for them, make any misrepresentation as to the facts relative to the value of the Ella and Missing Link claims to the complainants, or any of them?

4th. If such representations were made, did the complainants rely upon them in determining whether they would sell the mining claims to the Buffalo Hump Company, or in fixing the price at which they would sell?

5th. What were the conditions as to the development and value of the Ella and Missing Link claims at the time of the negotiations and sale?

The record in this case is extravagant, in that it contains a vast amount of utterly irrelevant material consisting of long documents that have no bearing whatever on the issues involved, and it is only with a vast amount of patient work that the material facts can be sifted from the record. The burden of this matter came in through the attempt of the complainants to support the third issue, heretofore stated, viz: "Did either of the defendants, or any person authorized to speak for them, make any misrepresentation as to the facts relative to the value of the Ella and Missing Link claims to the complainants or any of them?" This is pre-supposing that there was some duty resting upon the defendants, or some of them, at any time, to state any facts to the complainants, or some of them. Such duty could arise only from the existence of a fiduciary relation be-

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The record in this case is extravagant, in that it contains a vast amount of utterly irrelevant material consisting of long documents that have no bearing whatever on the issues involved, and it is only with a vast amount of patient work that the material facts can be sifted from the record. The burden of this matter came in through the attempt of the complainants to support the third issue, heretofore stated, viz: "Did either of the defendants, or any person authorized to speak for them, make any misrepresentation as to the facts relative to the value of the Ella and Missing Link claims to the complainants or any of them?" This is pre-supposing that there was some duty resting upon the defendants, or some of them, at any time, to state any facts to the complainants, or some of them. Such duty could arise only from the existence of a fiduciary relation be-

tween the parties under which the defendants, or persons representing them, were bound to advise the plaintiffs as to all of the facts touching the value of the property and of which the complainants could not otherwise inform themselves. If the complainants had knowledge, or opportunity to obtain knowledge, as to the value of the property the law requires them to protect themselves. In this case there is no allegation of the exclusion of the complainants, or that they could not have obtained all information upon inquiry.

When one party approaches another for the purpose of buying property the seller is put upon enquiry as to the value which he will place upon it. He is primarily supposed to know its value. If there are facts existing which might affect the value, of which he is not advised, it is his duty to seek information from a proper source. The law does not allow him to shut his eyes as to the facts which he might ascertain, and accepting the offer of the purchaser, reserve to himself the right to attack the sale in case he should afterwards discover that the property was worth more than the purchaser offered and paid for it. In this case it appears from the testimony of Patrick Clark, one of the complainants, that he did not take the word of the purchaser as to the value of the property; but that he raised him nearly double the price offered. He must be presumed to have done it on some information, as to the value of the property, independent of what the purchaser gave him, otherwise he would have accepted the price offered by the purchaser, if he relied at all upon the purchaser's statement of

the facts, or judgment as to the value of the property. The rules sought to be applied by the complainants in this case that where a seller relies upon the value placed upon the property by the purchaser, or upon statements made by the purchaser as to its value that he may compel a re-conveyance in case the purchaser has withheld facts, or misstated facts, in regard to the value of the property, has no application whatever in a case where the testimony establishes beyond controversy the fact that the seller did not accept the price offered or rely upon the facts stated by the purchaser. The testimony of Clark settles the question of fact in regard to this matter. Sweeny's general statements, if he made them, as to his object in purchasing, or as to the value of the property, fall far short of the class of statements to which the rule invoked by complainants is applied. We are therefore put to enquiry as to whether or not Culbertson made any statements to Clark or to any of the complainants in regard to the value of this property upon which they acted, and whether or not statements made by Culbertson would affect the integrity of the transaction.

Culbertson testifies that he made no statements to Clark as to the value of this property except as to the barren drift, and the testimony shows that the statements which he made in regard to that drift were true. Clark attempts in a general off hand way to state that Culbertson told him that there was nothing discovered of value at the time that he applied for the deed, but the testimony is so overwhelming against Clark in

this regard that nothing can be based upon it. The Court finds on the evidence, the fact, which is fully established, that Clark's statement that Culbertson asked him for the deed in Spokane at the time he claims these statements were made, is untrue, and that Culbertson wrote for the deed from Burke to Clark at Spokane, and that the deed was sent with his letter, written in his own handwriting, for execution. This is established beyond controversy by the fact that Clark's secretary is shown to have had the deed executed with some formalities suggested by Culbertson's letter and to have returned the deed to Culbertson at Burke. The receipt of it was acknowledged by Culbertson, thus establishing exactly the nature of that transaction. Clark does not pretend that Culbertson made any statements to him at any other time than at this alleged interview, which is shown not to have existed.

In considering this ground, we will take up the question as to what the facts were at the time of the sale. It appears that in August one of the defendants, having acquired title to the neighboring claims entered upon an extensive system of diamond drill work and that a hole was drilled from what is known as the "barren drift" in a northerly direction without any favorable results. That the drill was then swung around in the opposite direction, and without intention of doing so, it penetrated the Missing Link ground from the west, and discovered some very encouraging ledge material and ore. Notwithstanding this fact the defendant did not seem to have thought enough of the ore and ledge thus encountered by this

diamond drill hole to have taken any steps to open it up, but went further west and drilled another hole in a southerly direction, which was not started in, nor did it penetrate, the Ella claim, but it found some evidence of ore in the Poorman claim near by. The position of these holes will be found on the plat in the Transcript at pages 148 and 1294. If the defendant had intended to prospect the Ella claim with the diamond drill it would have undoubtedly projected hole No. 3 in an entirely different direction. No part of it is within the Ella claim and Culbertson says their object was not to prospect the Ella or Missing Link claims, but their own ground and that it was not until long after they had bought that they knew that they had entered plaintiffs' ground.

We would particularly call the Court's attention to the fact that the diagonal line crossing this diagram intersecting the face of the cross-cut is the east line of the Poorman claim, and that the Poorman claim is patented to that line, and is many years senior to the Ella and Missing Link claims. Both these diamond drill holes were made before the middle of August. Some time later in August the cross-cut was started in the Poorman claim running southward. It started at a short distance east of the drill hole No. 3. It appears that at about 45 feet from the mouth of this cross-cut some ore was encountered, but it does not seem to have been of sufficient importance to have caused the defendant to stop at that point and develop the same, but the cross-cut was driven further through lean and barren ground until they came to a small

streak of ore somewhere from three to six inches varying in width, a piece of which is in evidence and is here referred to for examination showing the exact width and character of the ore that was encountered at the face of this cross-cut.

The testimony establishes the fact beyond controversy that at the time of the sale of this property the work had not proceeded beyond the mere reaching of this last mentioned ore. Let us consider what it amounts to in a mine where the mere finding of ore, as the witnesses have testified, is not conclusive of the existence of ore bodies of sufficient importance to guarantee that they will be profitable upon being opened and worked. The testimony shows that such ore bodies are frequently encountered, which, upon development, prove to be of small or no importance. Such discoveries as are shown to have been made in this ground prior to the time of the sale by complainants, were slight evidence of values and would not have been taken as indications of any considerable value had they been inspected, by all parties, to any extent. They were merely indications of the possibility of the existence of ore bodies that might give a value to the property.

The complainants, in their argument and in the introduction of their testimony, have assumed at all times that in determining the question as to the value of the property at the time of the sale they were entitled to take into account those things and conditions that have resulted from the development of that which was then in sight. They introduced the testimony of witnesses to show what was afterward found in

the east drift driven from the end of the cross-cut; but the Court will bear in mind that not a foot of the east drift had been run at the time the plaintiff sold. They have introduced testimony as to what was taken from the intermediate drift in the cross-cut, but the Court will bear in mind that not a foot of the work of development on that intermediate drift had been done at the time of the sale. The ore in the intermediate cross-cut proved to be of little or no value upon further development, and it is established beyond controversy, that it was not until the south drift had been driven upward of 75 feet that any values were discovered in the streak of ore upon which the complainants placed so much reliance, in the face of the cross-cut. For 75 feet it was merely a streak indicating the existence of the ledge without any substantial values. At the time of the trial, and to this day, no work of development has been done to the west, upon the ore that was in the face of the cross-cut at the time of the sale.

Culbertson testifies that he did not attach much importance to what was called the find or strike of ore, because that from his experience in the mine, he knew that the existence of such indications, or ore, as was found in either the diamond drill holes or in the cross-cut was not reliable in determining the value of the mine. That the value could only be determined by subsequent developments.

It is evident from the testimony, and from all of the facts considered together, in this case that at the time of the sale by the complainants the property was not worth more than they

got for it. It is evident that if today the property stood undeveloped, except as it was on the date of the sale that they could not sell it to any person on earth for a dollar more than they got for it.

These facts being true, what information was withheld from the complainants of which they are entitled to complain? Even admitting that the information regarding existing conditions at the time of sale was not fully conveyed to them by the purchaser, or any person representing it. If no facts that would have established, or tended to establish a greater value than that received for the property, were withheld from the sellers, then it matters not what knowledge the purchaser may have had in regard to the property, or that such facts or circumstances may have been withheld from the complainant, unless such acts on the part of the purchaser tended to deceive and mislead, the complainant upon some point which the complainant was entitled to rely upon the purchaser or its representatives for information.

This brings us to the consideration of the fourth issue. As to whether or not, if such representations were made the complainants relied upon them in determining whether they would sell the mining claim to the Buffalo Hump Company or in fixing the price at which they would sell. We have already considered this question so far as it related to the transaction between Patrick Clark and Charles Sweeny wherein Clark asserts that he made the price because of the representations made by Sweeny, but we find that not only was Clark attempt-

ing to sell this property for a price which he himself fixed upon it, but that he was trying to sell Sweeny a half interest in the Sheridan claim, and made a sale of such interest a condition precedent to doing business for the Ella and Missing Link title.

It is important to consider the manner of the production of the testimony of Patrick Clark as well as its substance in regard to his experience and knowledge of conditions on the 600 and 800-foot levels. It will be borne in mind that all of the work on these levels was done under the management of Mr. Clark and that neither of them were accessible to the defendants or to any person connected with them at any time until after the commencement of this suit. That all knowledge as to the quantity and value of the ores taken therefrom and the condition of the ledge therein was the exclusive knowledge of the plaintiffs.

At page 490 of the Transcript Mr. Clark makes light of the vein on those levels, and says that they quit work because it did not pay: That at that time lead was from 3 cents to $3\frac{1}{2}$ cents per pound, and that at the time Mr. Sweeny purchased, lead was 4 cents to $4\frac{1}{2}$ cents per pound. (Trans., p. 491.) Mr. Clark was asked:

Q. Now, would the fact that you had less than a foot of ore there, and on the 1200 you had four feet of clean ore, and a vein of ore considerably larger that would pay to work, I will ask you to state as to what that indicates with reference to the future? To which witness replied:

“It indicates that it might continue on quite a distance, but that is speculative.” Thus showing that Mr. Clark did not consider that an increase in size in a vein between the 800 and 1200-foot levels from one foot to four feet, indicated to a certainty the existence of great values. He admits it would be speculative. (Trans., p. 496.) He states that while he was the manager of the Poorman mine, he first penetrated the Ella ground with a tunnel in 1893 or 1894, he is not certain, That he did so from the 600-foot level of the Poorman claim, and ran clear through the Ella and Missing Link claims into the O’Neil. Run several hundred feet into the O’Neil ground. He thinks this was in 1893, but it was surely during the time of his management, and when he was giving personal attention to it. That he was frequently on the ground and in the workings of the mine (Trans., p. 497). That it was prior to the consolidation of the Tiger and Poorman mines. That he followed the vein on the 600-foot level through the Ella into the O’Neil ground.

We would particularly direct the Court’s attention to the map (p. 1292 of the Trans.), in which these levels and the stopes hereinafter referred to in connection with them are shown in blue. Commencing at page 498 the Court will find the testimony of Clark in regard to the 600 and 800-foot levels, in which he says he “did a little stoping,” but attempts to minimize it and to create the impression that it was of no special consequence. He says (p. 498) he does not know how much ore he shipped from these stopes; could not approximate it.

On page 499 he says the ore was mingled with that of the Poorman and he again declines to give any estimate as to how much of the ore there was, and when he is asked as to the books containing an account of such ores he says that he has no books; that he does not know what has become of them; that he does not know who has them; that he does not know who he turned them over to. He is pressed strongly in regard to the books and accounts and disclaims any knowledge of them or as to the value of the ores taken from these stopes.

Again, on page 512, he disclaims knowledge as to the width or value of the ore in the Ella claim, and on page 513 he says it was not profitable; that they made no money; that the Poorman bought the ore in a crude state; that it was weighed and sampled; that there was some arrangement but he cannot now recall it; that he has no book account of it; that he kept no personal account; that he had lost the books. That he represented all of his co-owners in the ore settlement between the Ella and Poorman. That whatever sums of money the Poorman paid the Ella for ore, was paid to him. That he does not think there were any books in existence (p. 514). That the Ella never shipped any ore as Ella ore, of which he has any recollection. That he cannot tell even approximately how much money the Poorman Company paid the Ella mine for ore which it bought of them. That he can only tell that the Ella owners made no profit out of it.

On page 515 he testifies that the lowest level that had been driven east from the Poorman was the level from which they

had stoped ore on the Ella ground. That they were driving the 1000-foot level in that direction, but he does not know how far it had been driven. That so far as the development of the mine was concerned at the time that he left the management of the Poorman mine, the lowest level that had been driven to the east showed stoping or shipping ore in the Ella ground. (Trans., p. 515.) His testimony shows that both the 600 and 800-foot levels were driven clear through the Ella and Missing Link claims into the O'Neil during his management. He says he does not remember having stoped ore in the O'Neil ground, two-thirds of which belonged to strangers. That he might have stoped a little on the 600-foot level. That it did not pay for doing the drifting through the O'Neil, hence there was nothing coming to the owners of that claim.

He admits (Trans., p. 515) that he charged the O'Neil owners with the cost of projecting this drift into their ground and made such charges an offset against the value of the ore which he took out of the O'Neil ground. That he did not charge the Ella owners with the cost of projecting the drift of the Poorman through their ground.

At a subsequent hearing, some twenty days later (Trans., p. 546), Mr. Clark brought into Court the books containing an account between the Poorman and the Ella claims of the ore taken from the 600 and 800-foot stopes. From these books it appeared that the Poorman Company had paid the plaintiffs, as owners of the Ella claim, \$16,524.78 net for ores taken from that ground, and it appears from these books that

the expense of mining these ores was paid by the Poorman Mining Company. That the expense of the development by running tunnels through to the O'Neil ground was charged against the O'Neil claim bringing it in debt to the Poorman Company \$17,858.54 and giving a credit to the O'Neil claimants for ores taken from the stope on the 600-foot level of \$2,425.39, leaving a charge against the O'Neil claimants of \$15,433.15 on account of labor and supplies and developing account.

Mr. Clark says he cannot remember what work was done on the O'Neil claim for the Poorman Company for which that indebtedness accrued. That he has no other books. That he cannot give the number of feet of development within the O'Neil ground. The Poorman Company owned a one-third interest in the O'Neil claim. He cannot tell the gross amount of ore taken out of the O'Neil ground (Trans., p. 557).

This is a general synopsis of Mr. Clark's testimony from which we are to gather the facts as to his knowledge, and that of Mr. Harvey, who had direct charge of the work under Mr. Clark, in regard to the evidences of value and their knowledge of value within the ground in controversy in this action. With lead worth \$1.00 per hundred less than at the time Sweeney bought, the plaintiffs made a net profit of over \$16,000 from two small stopes upon the ledge, and a reference to the testimony of witness Smith (Trans., p. 746) and following will show that the thickness of the ore and its quality in the 600 and 800-foot stopes at the time when Clark quit work

thereon, and at the time of the purchase by the defendants, and now is such that these stopes can be worked to a profit and that there is no material difference between the thickness and value of the ore exposed therein than between the thickness and value of the ore in the works of the defendants below the 1200-foot level. Samples of this ore were brought into Court (Trans., pp. 758-759). The testimony of the several witnesses introduced show conclusively the knowledge possessed by plaintiffs Clark and Harvey as to the values in the 600 and 800-foot levels at the time they quit work therein, which was doubtless because of the consolidation of the Tiger and Poor-man claims, and the change of management.

Culbertson testifies that in discussing with Clark the fact that the barren drift had not picked up the ledge developed in the levels above, Clark suggested that the ledge probably laid to the south of the barren drift thus indicating clearly that he was on the alert as to the possibility of ore bodies being discovered in the lower levels in this mine to the south, as the fact afterwards appeared to be, and did not consider the failure to find ore in the barren drift conclusive as to the value of the property.

Primarily the value of property is to be taken as the price fixed by the plaintiffs as their selling price, but they say that had they known the facts in regard to the development of the property and the condition shown by such development, they would not have sold at that price. And Patrick Clark, one of the plaintiffs, who represented all of the other plaintiffs in ne-

gotiating for the sale of the property, testifies that he had been engaged in mining for 35 years. That for eight years he had been the general manager and had direct charge and control of the working of the Poorman mine which abuts upon the ground in controversy on the west and also for several years had actually mined and operated the ground in controversy, extracting therefrom \$16,524.78 net worth of ore when lead was from 3 cents to 3½ cents per pound.

He testifies (p. 488 of Trans.) that had he been advised of all that he is now advised of as to the condition of the mine at the time of selling, that he did not think he would have been very anxious to sell, but would consider it worth perhaps \$100,000. He testifies (p. 519) that it would cost about \$300,000 to equip the claims in controversy to work them as an independent mining proposition. At page 489 he was handed the annual report of Charles Sweeny, as manager of the Empire State-Idaho Mining & Developing Company, which is plaintiff's Exhibit 17, wherein Sweeny says, in speaking of the entire group of mines at Burke, which consists, among others, of the Tiger and Poorman mines, together with the Ella and Missing Link, O'Neil and others, that "there is nothing in the lowest workings to show any decrease in the value of the ores, or in the quantity; and with cheap electric power later on for pumping and general purposes, there is no reason why this property should not be worked profitably to a depth of 5,000 feet." And witness was then asked that assuming that Sweeny was correct in this conditional prophesy, and that the ore bodies

in the Ella should extend downward in the earth 5,000 feet with virgin ground above it up to the 800-foot level, what, in his opinion, would be the value of the Ella and Missing Link claims? Whereupon the witness replied, "About \$1,000,000." But the witness declined to second Mr. Sweeny's opinion in regard to this hypothetical proposition. Nevertheless, on the strength of this question and answer the complainants have assumed that there was a million dollars in values involved in this suit, when as a matter of fact Clark testifies that had he known all that Sweeny is alleged to have known at the time of the purchase he would have fixed the value not to exceed \$100,000, and this, based upon the expenditure for development of \$300,000. This witness was thoroughly experienced in the selling of ores and the working of mines of this character. He testifies, at page 491, that when they quit working on the 600 and 800-foot levels of the Ella and Missing Link claims that lead was worth at least a cent a pound less than when he sold to Sweeny and yet up to the time that they quit working on those stopes, it was paying. And he admits, on page 491, that the prospect when he quit work was based upon at least a foot of good ore.

As a hypothesis for his statement, that the mine was worth \$100,000 at the time he sold, he says that had he known of the values that existed, about one of the first things that he thinks he would have done would be to take in the O'Neil, if he could get it, and work the claims jointly, if not he would work it by sinking a shaft on the Poorman Extension property which was

then controlled by him and his friends and would have operated it in either manner. He admits that he did not own the O'Neil claim. That a man by the name of O'Neil owned one-third; the Standard Mining Company one-third and the Buffalo Hump or Tiger-Poorman one-third. He does not pretend to know that the outstanding interests in the O'Neil claim could have been bought but thinks the Buffalo Hump Company afterwards purchased them. The witness then enters into an elaborate description of the method in which he would have worked this property at a preliminary expenditure of \$300,000 for equipment. To a mining man the proposition is so absurd as to need scant consideration. It is evident that the property had no value except it could be worked through the already developed neighboring claims to the west, and over this claim Mr. Clark did not have, nor could he have obtained, any control that would have enabled him to work the property.

In estimating the value of a mining claim on a given date, as before stated, we must consider only the conditions that existed at that time. Taking into consideration the length on the ledge, the fact that a diamond drill had penetrated the ledge as described by the witness, and that a cross-cut had barely reached it at the time of the sale, afforded no reasonable basis upon which to conclude that the property was worth any more than the sum paid for it. The purchaser was taking all the chances of getting even the purchase price back according to the testimony.

It seems that all through this case there has been a disposition to consider the ore that was developed after the sale, by the plaintiffs, in determining the value of the property at that time; and the fact that no one can make any estimate upon the existence of ores not actually developed has been lost sight of. The testimony of plaintiffs' own witnesses establishes the fact, beyond a question, that it was weeks after the sale of the property by the plaintiffs before ores of any value were encountered in the mine in the running of the east drift from the cross-cut or elsewhere. It is equally evident from the evidence in the case that the ores that have been extracted from the mine upon which so much stress has been laid, were developed in the depth, by defendant, at great expense and many months after the sale by the plaintiffs. If, as plaintiffs contend, the existence and production of ores on the 600 and 800-foot levels was not a sufficient assurance to them of the existence of ores on the 1200-foot level, why are we to conclude that the existence of ores on the 1200-foot level, that had produced no values at the time of the sale by plaintiffs, should be accepted by the defendants as a guaranty of great values at that time, and that the Court should now hold them responsible for the value of the ores which they struck in the months following the purchase in ground that had not been then open. The question as to the values must be determined upon the conditions that actually existed at the time of the sale, and under the circumstances of this case, the plaintiffs are entitled to no

presumptions therefrom as to the ore bodies undeveloped, or as to the future value of the ground.

Under the law, if one sells a mine after having had an experience equivalent to that of the plaintiffs herein in its management and development, and the purchaser, acting on his judgment, believing that the mine will develop great values, purchases, and, within the day of purchase should, develop such values, the seller could take no advantage of that fact, and claim that the purchaser should have given the seller the benefit of such judgment.

From all of the facts in the case as developed by the testimony, it is a sure thing that no other purchaser than Sweeny could have been found who, with a full knowledge of all the facts and circumstances which Sweeny is alleged to have had, would have paid more than \$5,000 for the plaintiffs' claims. It is equally true that except for the advantages afforded by the ownership of the Poorman mine adjoining, no purchaser, with full knowledge of the facts, as they are alleged by the plaintiffs to have been, would have paid \$5,000 for the property.

Recurring to the consideration of the alleged misstatements on the part of Sweeny and Culbertson, and the withholding of information by them from the plaintiffs, as to what they had discovered through the development work by diamond drill and otherwise, the charge that the possession or acts of the defendants were clandestine is completely disproven. Sweeny and Culbertson deny that any misrepresentations were made, or that any information was withheld: plaintiffs' witness Jay

testifies that at the time of the alleged developments there were 200 men working in the mine and in the adjoining ground, the Poorman claim; and that the diamond drill work was done by contract work in the ordinary course of such business. It is not alleged, or claimed, that the works were closed against the plaintiffs at any time, or that the plaintiffs, or anyone in their behalf, ever sought to enter, or make inquiry as to the nature or character of the development work, or as to what had been discovered thereby. It is equally clear from the testimony of plaintiff Clark that he did not take Sweeny's valuation, or his word, as to the value of the claims; that he utterly rejected the offer made by Sweeny and fixed a price of his own which Sweeny eventually agreed to.

In order to establish the contention of plaintiffs that they sold on the representation of Sweeny and Culbertson, or either of them, as to the value of the property, it is necessary that they should have sold for the price and value fixed by Sweeny or Culbertson. The very fact that they entered into a contention with Sweeny in regard to the value is conclusive proof that they had, or thought they had, information sufficient to enable them to fix a price upon the property independent of Sweeny or Culbertson, and that they were on inquiry as to values. If they did not accept Sweeny's valuation and yet sold the property for less than what it was worth, they cannot hold Sweeny, or those for whom he acted, responsible, and can claim nothing by reason of the alleged undervaluation of the property.

The plaintiffs have called to their assistance Joseph McDonald, who, in the most unblushing manner, testifies that he was voluntarily a party to a scheme to defraud the plaintiffs; that he assisted Sweeny and Culbertson therein, and with great detail and circumspection, undertakes to narrate conversations with Sweeny, and arrangements entered into between himself and Sweeny, that if true should place him behind the doors of some reformatory institution. He undertakes to justify his statements on the ground that "a man should be true to his employer."

He admits thereby that he would be willing to enter into a scheme to defraud his neighbor, or persons for whom he pretended personal friendship, at the instance of his employer. He is contradicted by both Sweeny and Culbertson, and in some of his most explicit and circumstantial statements as to the striking of ore in the drill holes, and as to his personal inspection, and participation therein, he is contradicted by disinterested witnesses, who had charge of the drills and who were doing the work. With much apparent precision he testified that the ore was struck during the night, and that he was called up on the telephone and advised of the fact, and that he went up to the mine in the night to see to the work (Trans., p. 370), and then testifies in detail as to what occurred; while the time books, and the impartial record kept by the drill men, show that the ore was struck about the middle of the day, and all of the men connected with the work swear positively that McDonald was not there at any time in connection therewith.

As suggested by the Circuit Court in its decision, he was at all times very careful not to fix accurate dates, notwithstanding the fact that he had claimed great responsibility in regard to all of these things. The fact is that McDonald, through motives not necessary to inquire particularly about, has undertaken to furnish testimony to break down the defendants, and especially Sweeny and Culbertson. His malice is so apparent throughout his testimony that, taken in connection with the foregoing suggestions, we feel that he may be dismissed from the consideration of the case as an unimportant factor therein, despite the fact that he had evidently assumed to direct the result of the case by his testimony. Appellants devote much attention to his testimony in their brief, doubtless for the reason that he is a chief factor in prosecuting the suit and represents the sensational element so prominent therein. He is shown to be entirely unworthy of belief, both by the overwhelming evidence of living witnesses and by the incontrovertible evidence of the rocks, as they existed then and now. He is discredited in his statement as to ore in the east drift from the crosscut by the testimony of all plaintiffs' witnesses, and by the visible evidence of the rocks there now for inspection. He says (Trans. p. 379), the crosscut showed from four to six feet of clean shipping ore. When we challenged them to go there, with the Court's officer, to test the truth of this statement, they dared not do so, as the fact would have appeared that there was no clean shipping ore there, and only a few inches of concentrating ore. On page 380 he says the crosscut

showed five feet of clean shipping ore. The evidence showed, and the fact is, that there was not to exceed four inches of ore such as we have brought into court, and no clean shipping ore at all. On page 291 he says the ore in the east drift from the crosscut was in about 100 feet when he was last there; that the ore body in the drift was the same as in the crosscut which he had said was in from eight to fifteen feet of clean shipping ore. This whole statement is shown by all the testimony to be so outrageously false that he stands alone, and the complainants dared not submit the premises to inspection, which would have shown absolutely no foundation for such a statement.

Much of the testimony was directed to the amount of ore produced from below the 1200 foot level within the Ella and Missing Link claims, and as to the width of the ledge, size of ore bodies, etc. As we have before suggested, such testimony had no bearing whatever upon the issues in the case, but was called forth for the purpose of creating a prejudice, or perhaps a sympathy would express it better, for the parties who claim to have sold a mining claim for less than it was worth.

The plaintiff introduced the testimony of Ralston, McDonald, and others, to the effect that at the intermediate drift there was several feet of shipping ore, and these witnesses sought to create the impression that a great mine had really been discovered prior to the sale by plaintiffs. The floor of the level where this ore was said to have been discovered, re-

mains intact to this day, and upon an investigation of the point at which the ore was said to have been from five to seven feet, we found a streak of ore less than four inches in width, and that of only medium quality. Such streaks are not indications of great values, and more frequently prove to be small bodies of ore of no value. At the time of the sale these streaks had not been developed.

We challenged the plaintiff to send upon the ground engineers to be appointed by the Court, or that the Court should go upon the ground, to determine as to whether or not the witnesses for the plaintiff or defendant were telling the truth in regard to the amount of ore at the intermediate drift. The complainant strenuously opposed any examination being made by the Court or the Court's representatives. But one inference can be drawn from this. They knew that the testimony which they had given in regard to the existence of large ore bodies at this point was untrue, and that an inspection of the ground by the Court would determine that fact.

The claim made all through the case that Sweeny and Culbertson were laying deep plans and scheming day and night to get the property, is not sustained; as a matter of fact, Culbertson did not think enough of it to record his deeds until long after it is claimed that he was advised of the great value of the mine, and in as much as Sweeny, while aware of the diamond drill holes and the results found in them in August, made no attempt to purchase the property or to approach the owners thereof until October. The fact that between the date

that the deal was agreed upon and the delivery of the deed, seven days elapsed during which Clark could have made any inquiry or examination that he had seen fit to make, clearly proves that there is no foundation whatever for the charge of surreptitious dealing, or the suppression of facts, or anxiety on the part of Sweeny or Culbertson that the deal should be closed.

The question as to the discovery of rich bodies of ore at the intermediate drift and at the face of the crosscut was, perhaps, of more importance than any other question involved in the case, if we are to exonerate the plaintiffs from any liability to determine the value of the mine for themselves, and to allow them to rely entirely upon the representations which they claim were made by Sweeny. As these are the only two points on the ledge which had been developed, except diamond drill work, prior to the sale, and an inspection by the Court or its representatives would have determined this point to an absolute certainty, yet the plaintiffs resisted such examination.

The attempt throughout the case on the part of the plaintiff to avoid the facts in regard to the 600 and 800-foot levels, and their failure, voluntarily, to bring in any evidence, as a part of their case, on that subject, indicates a lack of candor and good faith in the presentation of their case to the Court, which is in keeping with their refusal to have the facts determined by an inspection of the ground by the Court or its officers.

OBJECTIONS TO ADMISSION OF TESTIMONY.

At pages 140-6 will be found the defendants' motion in support of the several objections and exceptions taken before the examiner. This motion is made to strike from the record matters improperly admitted therein, and was brought on for hearing before the Circuit Court preliminary to the hearing upon the main case. The Court declined to strike out the matters set forth in defendants' motion, and exception was taken, and defendants' bill of exceptions settled. (Trans., p. 146.)

Inasmuch as the Court entered a decree in favor of the defendants, it may be suggested that the defendants should not fact that this Court will review the entire record, and may, complain of any action taken by the Court, but in view of the under the rule, arrive at an entirely different conclusion from that arrived at by the Circuit Court, we feel it incumbent upon us to urge these objections saved in the record at the time of the taking of the testimony before the examiner.

At page 431 of the Transcript it will appear that the west drift, referred to in the question, was not made until after the title had passed from the plaintiffs; in fact, that it was not started until the first of November, 1899. The same was true as to the next objection, which is found on page 432 of the Transcript, and the following objection, found on page 433 of the Transcript, the next one on page 436, and also of the objections on pages 440, 441 and 442.

These objections are all directed to testimony as to the condition of the mine, and things that had transpired, after the title had passed from the plaintiffs to the defendant, the Buffalo Hump Mining Company. It was an attempt on the part of the complainants to support their allegations that the knowledge had by Sweeny and Culbertson was withheld from the sellers by showing the development of ore bodies, and things that happened, after the title had passed.

The first and second objections to the testimony of Patrick Clark, one of the complainants, as to the conversations had with Culbertson, are based upon the principle that conversations with Culbertson as to any arrangement existing between Culbertson and the complainants by which he was to give them private or secret information as to the condition of the property which he was employed in superintending could not affect the rights of the defendants, and was an attempt on their part to interpose an improper contract or understanding between Culbertson and them, which they sought to take advantage of in support of their contention that the defendants were bound to help Culbertson carry out such a discreditable arrangement against their interests.

The next objection is as to the question propounded to Mr. Clark, page 488 of the Transcript, wherein he was asked: "Now, Mr. Clark, assuming that Mr. Sweeny had advised you that at the time he purchased this interest of you for the Buffalo Hump Mining Company, that a vein of ore four feet in width had been struck by diamond drill on the 1200-foot level on

the east end of the Ella, and that a drift had been driven through fifteen feet of ore on the west end of the Ella, what would you have asked for your four-fifths interest which you sold to him that day, and what would it have been worth?"

The objection to this question was based upon the fact that no such condition of facts existed, even if testimony had been introduced to sustain such a question; that it assumed that Mr. Sweeny had exclusive knowledge, and it also assumed that Mr. Clark had neither the knowledge nor the means of obtaining it.

On page 489 of the Transcript, plaintiffs introduced the annual report made by Charles Sweeny for the year ending April 30th, 1901, which is complainants' Exhibit No. 17. Objection was made to this, that it was clearly inadmissible, inasmuch as it was the annual report of Sweeny as to all of the properties of the defendant, the Empire State-Idaho Mining & Developing Company, and no separate statement of facts as to the grounds in controversy was made therein which could in any way affect the rights of the parties to this action, or bind them as to an admission of any facts. Another objection was that it was incorporating into the record a vast amount of useless matter, which, if it contained any statements beneficial to the complainants, such statements might have been separated from the report and used for whatever they were worth.

At page 521, the complainant Clark was asked if he believed the statements made by Culbertson and Sweeny at the time the deal was made. It was not claimed that Culbertson

made any statements to them, at or near that time, and whether he believed the statements of Sweeny or not would not affect this case unless it were shown that he had a right to rely upon such statements, and had no knowledge of his own on the subjects referred to in such statements. Mr. Clark is shown to have had such an intimate knowledge and acquaintance with the ground in controversy that, taken in connection with his experience as a miner and his acquaintance with the ledge, preclude the possibility that Sweeny, who, at that time had not been in the mine at all, had made statements upon which Mr. Clark relied in fixing the price for his property, and in view of the fact that Mr. Sweeny did not fix the price at all at which he would sell, but that Clark refused the price that Sweeny offered him, and fixed his own price, would indicate that Clark did not accept Sweeny's statement, and is presumed to have fixed the price, based upon his own knowledge, because he says Sweeny told him the property was not worth anything. Now why should Clark refuse to take \$2500, which Sweeny first offered him for property which Sweeny said was worth nothing, if he was to take Sweeny's word for the value of the property? And the conclusion is obvious that inasmuch as Clark fixed his own price on the property he must have rejected Sweeny's statement as to its value and placed a value upon it entirely independent of what Sweeny had told him.

On the same page of the Transcript, the witness was asked if he acted on the statements of Culbertson and Sweeny in conjunction with the fact that he did not have any other

information in the matter, and, over the objections of the defendants, he responded that he did. This comes within the suggestions just made as to the preceding question.

On page 524 of the Transcript the complainant, Patrick Clark, was asked: "Now, assuming, and we will make a proper apology to the gentlemen on the other side,—assuming that they were attempting to perpetrate a fraud upon you, and they had invited you into the mine to inspect it, explain whether or not it would have been possible to block this crosscut and send you off into the abandoned drift there, or whether you could have detected the discovery of any ore there?"

This was objected to as an improper form of question, and that it was asking the witness to assume something that it was not charged they ever tried to do. The witness answered that if they had wanted to hide the discovery of ore, they could have put in some timbers and blocked it up so he could not tell anything about it. This is in keeping with the subterfuge shown in his testimony in regard to being excluded from the mine, page 503.

This class of testimony, while it may not have affected the result, should have been stricken out by the Court. They first set up an imaginary wrong, and then proceed to demolish it at the expense of the defendants.

At pages 532-4, witness Kingsbury, one of the plaintiffs, was allowed, over the objection of defendants, to testify to conversations between himself and his co-plaintiffs in regard to the understanding and conditions under which Culbertson ac-

quired his interest. Such conversations were certainly not admissible as against these defendants for any purpose.

At page 534 witness Kingsbury was asked as to the value of the property, under certain hypothetical conditions, none of which conditions had been shown to exist.

At page 562 of the Transcript the plaintiffs offered in evidence an escrow agreement between David Holzman and the plaintiff Patrick Clark, which had no possible connection with the case, and then offered in evidence a deed from Holzman to Clark for no purpose whatever except to encumber the record with useless documents.

At page 582 of the Transcript, J. N. Justice, a witness called on behalf of plaintiffs, was allowed, over the objections of defendants, to testify as to conversations between himself and Sweeny, alleged to have taken place in the spring of 1900, more than six months after the property had passed from the complainants to the defendants, when such conversation showed on its face that it related to the purchase of the Tiger-Poorman Company, and not to the property in controversy in this action, and was utterly irrelevant and immaterial.

At page 642 of the Transcript, complainants' counsel called W. B. Heyburn, the solicitor for the defendants in this case, and asked whether or not Charles Sweeny, General Manager of the defendants, was the same Charles Sweeny mentioned in the case of Hanley vs. Sweeny, reported in Volume 109 of the Federal Reporter at page 712, and upon witness testifying that he was the same person, they offered in evidence

the opinion of this Court in that case, which is spread at length upon the Transcript from page 642 to 672, and is again printed in the Transcript as an Exhibit, at page 1232, thus occupying sixty pages of the printed record in this case, and we think that an inspection of this record will show that more than two hundred and fifty pages of it are taken up with the printing of useless and unnecessary documents.

We objected to the introduction of this document for the reason that it was offered for the purpose of discrediting Sweeny, and, in fact, outlawing him in the Court.

We may take occasion here to remark that perhaps no record in any appeal is so replete with approbrious terms, epithets, and charges, as the record in this case. It would seem that the plaintiffs have gone out of their way to find occasion for the repeated use of such terms, and all in the same spirit of the introduction of this opinion at length and the repeated printing of it in the record. It is safe to assume that the Court, upon the simple identification of the parties, would have given whatever weight might be given to it under the established rules of evidence. It was in any event irrelevant and entirely immaterial matter.

At pages 672-3 of the Transcript, Albert Allen was called to testify to conversations alleged to have been had with Mr. Sweeny, in regard to the purchase of these claims, some time in March or April, 1900, which was about six months after the purchase of this property by the defendants. This testimony was admitted over the objections of defendants, and the

witness was permitted to draw from his recollection a diagram which he said was similar to one which Sweeny drew while talking to him.

At page 948 and page 950 of Transcript, J. L. Rivers, a stenographer, was permitted to introduce, over the objections of defendants, the proceedings in a case covering nearly 30 pages, as to what witness McDonald said, and what transpired, in a suit having no bearing upon this cause, in which the testimony was taken in January, 1900. The testimony was incompetent as a whole. If any part of it was relevant it should have been selected and segregated from the mass of the record in that case and so introduced. As it is, the entire testimony may be disregarded and the objection to it should have been sustained.

At page 999 of the record, the complainants have interjected an affidavit made by Mr. Sweeny in this case upon an application made by the complainants for an injunction and receiver. This affidavit extends from page 999 to 1012 inclusive. It is an unnecessary incumbrance of the record, and if there are any points in it that should have been used in contradicting Mr. Sweeny, his attention should have been called to them in a specific manner, and such parts as were material only brought into the record.

In regard to the introduction into the record of these lengthy documents upon the slight excuse that there is something contained in them that might be pertinent, we would suggest that it would be as reasonable upon asking a man if he

was a citizen of the United States, to immediately introduce the Constitution of the United States and the Statutes at Large.

At page 1080 of the Transcript, one of the complainants is permitted to testify as to a conversation had with his co-plaintiff in regard to statements made by Culbertson. The question and answer are such an obvious violation of the rule of evidence that we merely call the Court's attention to them.

We have expended more time and space upon this questions of the record than we would be justified in doing except for the reason that a bad practice has grown up in the taking of testimony before an examiner, which results in encumbering the record of the case with a vast amount of useless and redundant matter, which adds greatly to the labor of counsel and of the Court in sifting the case down to the real facts in controversy, as well as adding enormously to the expense of printing the record.

In this case we have a volume of exhibits, the greater part of which were unnecessary in the case, and in many instances, as before suggested, they are a repetition of exhibits already spread upon the Transcript at length.

From the record and testimony in this case it appears that while Patrick Clark was the General Manager and representative of the Coeur d'Alene Silver-Lead Mining Company, a corporation having its principal place of business at Butte, Montana, and being represented in Idaho only by Patrick Clark, and owning the Poorman mine, in adjusting its lines on the east end, found, or created, a fraction of ground between the

Poorman and the O'Neil lode claims. This fraction of ground was located as the "Ella" and "Missing Link" claims, the Missing Link being evidently the result of a second determination of the fraction. Patrick Clark, his brother James Clark, James Harvey, his nephew, and B. C. Kingsbury, all of them either in the employ of the Coeur d'Alene Silver-Lead Mining Company, or interested in it as stockholders, or officers, secured to themselves these two fractions of ground lying practically on top of the mountain to the east of Canyon Creek and on the east end of the Poorman mining claim.

It is conceded by both sides that, except at great expense, this fraction of ground can only be worked in connection with the Poorman mine. It appears that, while Patrick Clark and James Harvey, were occupying positions in the employ of the company, taking advantage of the development upon the Poorman claim and of the facilities which such development offered for the working of the two fractions claimed by them, they drove the 600 and 800 foot levels, at the expense of their employer, from the Poorman mine into, and practically through, their fractions, and with the aid of the machinery, and taking advantage of the investment of the company, they extracted \$16,524.78 net values in ore from the fractions and divided it between themselves; they shipped two hundred and eighty-three tons of ore.

These suggestions are not made in a spirit of recrimination, but for the purpose of determining the relation of complainants to the Ella and Missing Link mine during their own-

ership and management thereof; their method of operating it, and the relation which these fractions have borne to the Poorman mine; and as to its bearing on the knowledge which the complainants had of the ore bodies within the fraction, and the profit or loss, at which such ore bodies could be worked.

Another item of history interesting in this case is found in the testimony of Clark, as well as in the allegations of the bill, wherein it would seem, according to the claim of the complainants, that they entered into a secret arrangement with Mr. Culbertson, whose time and services were the property of the Consolidated Tiger-Poorman Mining Company, under which they claim that Mr. Culbertson, while representing his company, should at the same time represent them and give them secret information based upon the operations of his company, from which they might derive an advantage and possibly a profit.

Clark and Kingsbury had made a secret arrangement to sell out their stock in the old company to Culbertson, unknown to their fellow stockholders, quite in keeping with their former plan of working their individual property at the expense of the stockholders of the company they represented. (Trans. p. 238.)

All of the assignments of error are covered by the foregoing consideration of the case from the standpoint of defendants.

The brief of counsel deals in abuse, innuendo, and harsh criticism of the parties and their witnesses, the manner of conducting the case, and the conclusions reached by the Court.

We have not thought it best to enter into a reply in kind. The criticism of the Circuit Court, at page 58 of their brief, would seem to be a violation of that rule of conservative action that should distinguish counsel in dealing with the opinion of the Court. The charge made against Mr. Culbertson and Mr. Sweeny, on pages 57 and 58, seems to be beyond the rule of courteous consideration that should be given to parties and witnesses in a court of justice. If the conduct of the case on the part of defendants was in violation of the recognized rules of law and practice, plaintiffs have their remedy by review in the proper courts, and should seek it there rather than in the vocabulary of abuse.

There is nothing in the record in this case to bring it within the rule of the authorities cited on pages 121 and 122 of appellants' brief, nor is there anything in the record that would authorize the Court to take into consideration the question of the expense of taking testimony in New York or of the failure to take testimony there.

Figures 2 and 3, at pages 109 and 111 of appellants' brief, represent nothing in this case. We have the ore in court. They have brought an imaginary picture of the ore seam; the actual ore, showing its width and character, is in court for examination.

We think that upon the record in this case the Court was justified in concluding that the complainants had delayed unnecessarily in commencing their suit.

It is one of a class of cases in which the Court does not permit a long delay on the part of a vendor in order that he may take advantage of the developments of a mine at the expense of another, to raise questions regarding the sale based upon such developments.

THE LAW OF THE CASE.

The rule that in all proceedings instituted to recover moneys or to set aside and annul deeds or contracts or other written instruments on the ground of alleged fraud practiced by a defendant upon a plaintiff, the evidence tending to prove the fraud and upon which to found a verdict or decree must be clear and satisfactory, is well established law.

Lalone vs. United States, 164 U. S., 255.

Representations as to the nature, quantity, or quality of the property or of the title by which it is held, however false in respect to the subject, which is mere matter of opinion such as estimates of value, or quantity of wood there is on land, or productiveness of soil, etc., are insufficient in themselves to entitle either party to a rescision of the contract.

Warvelle on Vendors, Section 847.

Homer vs. Perkins, 124 Mass., 431.

Hoffman vs. Wilhelm, 68 Iowa, 510.

Mooney vs. Miller, 102 Mass., 217.

The law presumes that each party to a contract to sell relies on his own judgment as to the value of the property sold where the facts upon which the value of the property depends are known, or may be known, to both.

Speiglemeyer vs. Crawford, 6th page, 254.

Fairchild vs. McMahan, 139 N. Y., 290.

There being no evidence of mental incapacity in the party relying on alleged statements, other than that afforded by the transaction itself, with equal means of knowing the truth, no statements by either party can be made available for the purpose of avoiding the sale. Particularly is this true where the party relying on such statements has a full knowledge of the value of the property, or is personally familiar and acquainted with the same, and has had reasonable opportunities of informing himself as to its value.

Brook vs. Hamilton, 16th Mass, 26.

Shackleton vs. Lawrence, 65 Ill., 175.

Slaughter vs. Gurson, 13 Wallace, 379.

The rule of law stated by Mr. Justice Field in this case is peculiarly applicable to the case at bar. The Court holds that the misrepresentation which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement, must relate to a material matter constituting an inducement to the contract, and respecting which the complaining party did not possess at hand the means of knowledge; and it must be a

misrepresentation upon which he relied, and by which he was actually misled to his injury.

Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say, in impeachment of the contract of sale, that he was deceived by the vendor's misrepresentations.

This rule of law is alike applicable to either vendor or vendee.

We have not undertaken to discuss all of the testimony in this case because we believe that the Court will carefully consider it and readily arrive at conclusions obviously to be drawn therefrom in determining the weight to be given to the testimony of the various witnesses, and the good or bad faith evinced by the witnesses when testifying.

While there is a decided conflict of testimony between the witnesses for plaintiffs and defendants, the circumstances surrounding the entire transaction, taken in connection with the facts to be deduced from the testimony, would lead to the conclusion that the allegations of the plaintiffs' bill were not sustained; that the defendants had been guilty of no act or thing that would entitle the plaintiffs to the relief sought in this action.

Respectfully submitted,

W. B. HEYBURN,

Solicitor for Appellee.

No. 870

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

PATRICK CLARK, BENJAMIN
C. KINGSBURY, JAMES P.
HARVEY AND A. G. KERNS,
Administrator of the Estate of
JAMES CLARK, Deceased,
Appellants,

vs.

THE BUFFALO HUMP MINING
COMPANY (a Corporation), AND
THE EMPIRE STATE-IDAHO
MINING AND DEVELOPING
COMPANY (a Corporation),
Appellees.

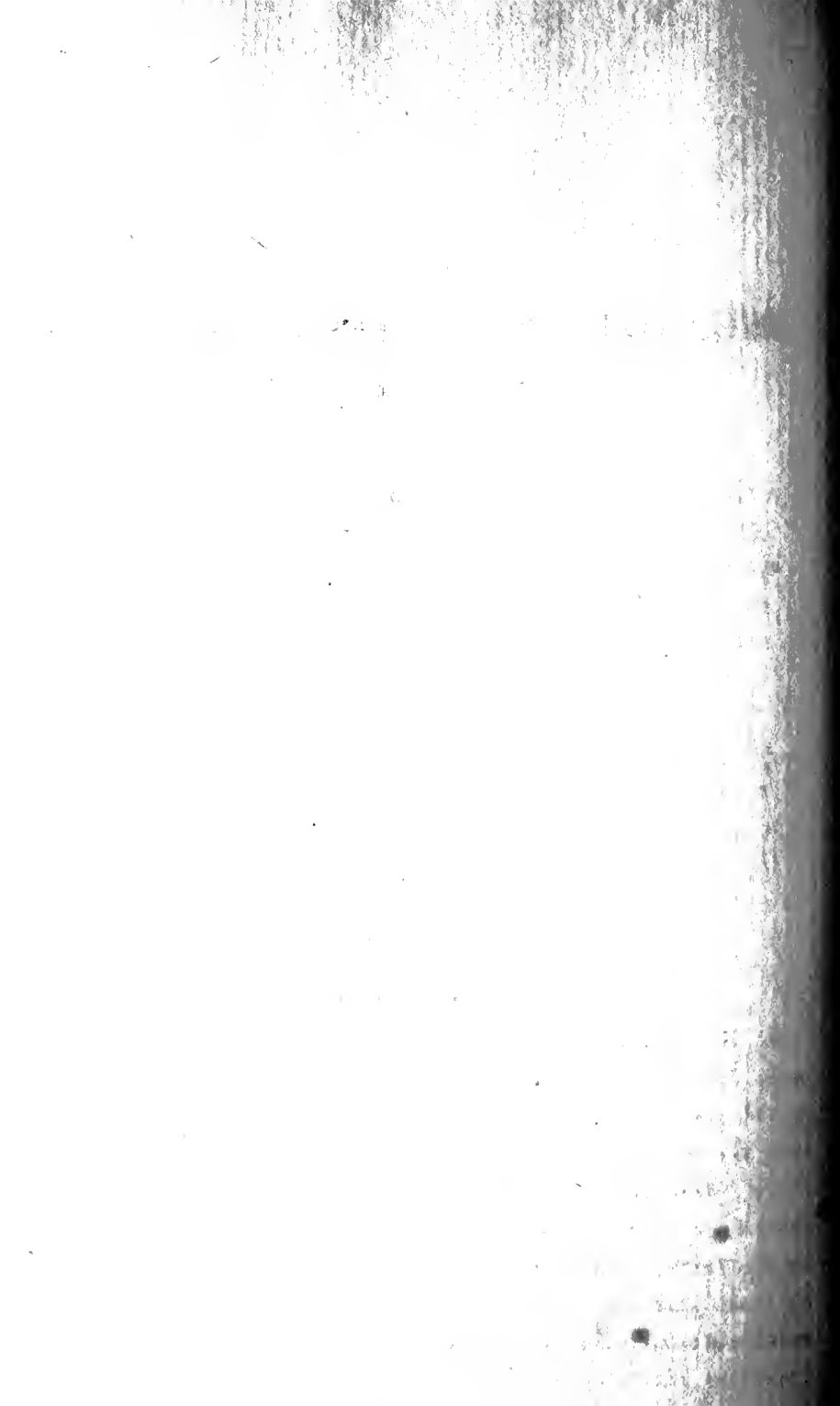
FILED
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APPELLANTS' REPLY BRIEF.

Upon Appeal from the United States Circuit Court
for the District of Idaho, Northern Division.

STOLL & McDONALD,
M. J. GORDON,
W. W. WOODS,

Solicitors for Appellants.



IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE NINTH CIRCUIT.

PATRICK CLARK, BENJAMIN C.
KINGSBURY, JAMES P. HARVEY
and A. G. KERNS, Administrator of
the Estate of JAMES CLARK, De-
ceased,

Appellants,

vs.

THE BUFFALO HUMP MINING COM-
PANY (a Corporation), and THE EM-
PIRE STATE-IDAHO MINING AND
DEVELOPING COMPANY (a Corpo-
ration),

Appellees.

Appellants' Reply Brief.

At the latter part of page 21 and the first part of page 22, also the latter part of page 30 and pages 31, 32, 33 and 34 of appellees' brief, they attempt to show that the Ella and Missing Link, on the 13th day of October, 1899, when they were sold, were not worth more than four thousand dollars, the amount paid for them by the Buffalo Hump Mining Company. It is contended by them that any value that the property had was the result of subsequent development. It is then urged by appellees that a large amount of the testimony which

pertained to subsequent development, showing the size of the drifts, stopes and voids generally within the Ella should be stricken, because it was irrelevant and immaterial. As to whether the Ella and Missing Link have the value which we contend for them at the time of the sale, is a question upon which there is some conflict of testimony. We submit that it was within the power of the appellees to have proven beyond question of doubt the size of the ore body at any and all places within the property by testimony of the most indisputable character, viz., their own records. It certainly will not be contended that a mining company, the value of whose property depends upon the size and value of the ore body, has not a record of every foot of the vein, showing the size and values. As to whether or not there was clean ore struck by the drill and by the crosscut, were questions of the utmost importance. Wright, the drillman, one of appellees' witnesses, said six feet of good concentrating ore was struck by the drill. Stone, a witness for the appellees, testified that only six inches of good ore was found in the crosscut. Our witnesses, Mr. Thomas Jay, Mr. Amos Jay, Mr. Macdonald, Mr. Ralston, Mr. Porter and Mr. Harvey, testified to four feet of clean ore at the point struck by the drill hole. And Mr. Tom Jay, Mr. Amos Jay, and Mr. Joseph Macdonald testified to five feet of clean ore in the crosscut, and all testified to a large amount of concentrating ore beside the clean ore in both places. Although the appellees had possession of the mine ever since October 13th, 1899, and even before that, they have seen fit since the commencement of this litigation, to remove all of the ore not only at the point where the drill penetrated

it, but for several levels above it and for an indefinite distance in both directions from it longitudinally. They did the same thing in the crosscut, leaving standing only a small slab of barren rock that they found somewhere in the floor of the crosscut, which they left standing there for reasons that will be apparent to the Court. Appellees not only suppressed their records, which it must be concluded that they have, showing the size of the ore body and the assay values within the Ella and Missing Link, but they suppressed and refused to produce upon the trial, the "Progress Map" and the testimony of the great number of witnesses who worked in the mine, and who have been in their employ, all of whom would have shown conclusively the exact size of the ore body at both places. We had no accurate, conclusive proof such as they had, and therefore we were driven to making such proof as was within our power. We made our proof by men who worked in the mine; by Mr. Macdonald, who was present when the ore was struck in the drill hole, and this is denied by the appellees, yet they failed to come forward with that proof which they had in their possession and which must have been absolutely accurate, and furnish the Court any evidence upon the subject except of the most unsatisfactory character. We contend that there has been no time in the history of the development of the Ella and Missing Link that they promised so much, as on the 13th day of October, 1899 (the day when it is charged that appellees made the false and fraudulent representations). The witnesses all have testified, and the scale, if put upon the map (plan and cross-sections of lower levels, Defendants' Exhibit No. 14, Section A, page 1294, volume IV, Trans.),

will show that the drift and the ore are wider at the place struck by drill hole No. 2, than at any other place in the east drift. It will also show by putting a scale upon the crosscut, that on the 13th day of October, 1899, there was exposed and revealed an equally large body of ore at that point. If we show by the size of the stopes and the drifts that they are from ten to twelve feet in width for a considerable distance, both vertically and longitudinally from the drill hole and the crosscut, and that at the point of the drill hole and the crosscut, the voids are of the same width, perhaps wider, is the argument from that not conclusive that there was ore taken from these drifts and stopes of the width that we find the voids, and is it not equally conclusive that the ore was of the same width at the point of the crosscut and drill hole? These voids and openings speak for themselves, we think. Appellees, however, contend that an opening fifteen or twenty feet wide is made underground for the purpose of *convenient mining*, but our evidence has shown, and they have not contradicted it, that a drift *six feet in width is sufficiently large for all purposes of convenient mining*. Their position is absurd. Think of it! Blasting, mining, tearing down, breaking up and hoisting twelve hundred feet to the surface—a greater quantity of barren rock than pay ore. For what purpose, pray? The only answer we have is, for convenience. It must be remembered that there was no back filling in this mine. Everything was hoisted to the surface. Appellees claim that there was no clean ore found in the Ella; that none was struck either by the drill or the crosscut. We have shown by our witnesses that for a distance of more than one hundred

feet westerly from the drill hole, and continuing even easterly from it, a nice body of clean ore averaging about four feet was found by the miners. This was the best character of evidence, the highest order of evidence that it was in our power to produce and we think it competent and material to prove the size of the ore body at the point where the drill and crosscut struck it.

A large amount of space is occupied by appellees in their brief to show that the ore on the eight hundred, where Mr. Clark quit work, was as good as ore found further down in the mine, and should have put him upon his guard, and that, therefore, Mr. Clark should not be heard to say that he had been misled by the false and fraudulent statements made to him by Mr. Sweeney. In other words, that he had no right to believe Mr. Sweeney. But this dogmatic statement, untrue in law, we think, is made and entirely unsupported by any citation of authorities whatsoever. The authorities cited by us upon this subject from most of the courts of the country to the effect that it does not lie in the mouth of a man who has deceived another, to say to him, "You ought not to have believed or trusted me," or, "You were yourself guilty of negligence," are unanswered either by contrary authorities or by any attempted argument showing their inapplicability. We addressed ourselves in our opening brief to this proposition, and will again call the Court's attention to the argument which we made, beginning at page 92, and continuing to and including page 101 of our opening brief. If we may be permitted, we will, in addition to the argument there made call the Court's attention to the testimony of Mr. Miller at page 726, volume II of the Transcript, as follows: About the

middle of the answer to the interrogatory, "By Mr. Stoll. Where are they?" he said: "The width of that ore, of the ore seam proper, above the 1100 level, up to and including the 800, as broken day by day, is two feet." And again, at the top of page 727, he said: "A. A portion of each, No. 2 and No. 3, being in the Ella ground. Below the 1100 level the ore that is broken and goes to the mill, will average about 4 1-2 to 5 feet in width, and I think that is the best way to get at the average conditions of the ore in that ground to-day." It seems to us that this is a complete answer to all that they have had to say upon this subject.

It is stated at pages 26 and 27 of appellees' brief that the books of the Poorman Company that were brought into court by Mr. Clark showed that \$16,524.78 net for ores taken from that ground had been paid to appellants by the Poorman Company. Those books did not show that. On the contrary, they showed but a payment of \$6,661.70 to appellants. (See page 561, volume II, Trans.) Any other sums paid were paid *by the smelter company*.

At the latter end of page 34 of appellees' brief, we think they state a very strange proposition. "In order to establish the contention of plaintiffs that they sold, on the representation of Sweeney and Culbertson, or either of them, as to the value of the property, it is necessary that they should have sold for the price and value fixed by Sweeney or Culbertson. The very fact that they entered into a contention with Sweeney in regard to the value is conclusive proof that they had, or thought they had, information sufficient to enable them to fix a price upon the property, independent of Sweeney or Culbert-

son, and that they were on inquiry as to value." Counsel cites no authorities in support of this proposition, and we assert with much confidence that none can be found to support it. We stated in our opening brief that the property was not sold as a mine, not even as a prospect. Mr. Sweeney stated that it was not worth fifteen dollars for the mineral that was in it, but it had other value. Mr. Sweeney looked upon it as a thing of value to his company as a way, connecting the Poorman and O'Neill, and for surface rights. Mr. Sweeney paid \$3,000 to Mr. Clark on the same day for a one-half interest in the Sheridan, simply for the surface rights. That is proportionately a higher price than was paid for the Ella and Missing Link.

It is stated in appellees' brief, at the top of page 23, that the sale of the Sheridan was made a condition precedent by appellants to the sale of the Ella and Missing Link. We challenge that statement. It is not supported by the record.

At the end of page 36, and pages 37 and 38 of appellees' brief, considerable is said about the challenge that was made to us, to send a disinterested person as an umpire, to go into the mine and determine certain facts to control the Court. We have addressed ourselves to that proposition in our opening brief at pages 108 to 116, and do not feel called upon to say anything additional except that the course suggested by counsel for appellees is unknown to practice, either on the law or equity side of the Court. What right has the Court, or one of the parties, to select someone whose testimony shall control the Court, to the exclusion of other witnesses, thus usurping the very function of the Court? It is the duty of the Court, after having heard all the evi-

dence, to decide the facts, and the fact that the Court appoints one man to go and make an investigation of a fact should certainly give no greater weight to his testimony, than that given to the testimony of any other honest witness.

At the latter end of page 39 of appellees' brief they charge the appellants with bad faith, because of their failure to bring in evidence concerning the 600 and 800 foot levels. We are fearful that had we brought in evidence upon those matters we would again have been charged with bad faith in encumbering the record with a lot of irrelevant and immaterial matter, as we have been in some other respects.

At page 46, appellees criticise us for having spread upon the transcript a second time, our Exhibit No. 37, at page 1232, volume IV of the Transcript, being the opinion of this Court in the case of Kennedy J. Hanley vs. Charles Sweeney et al. We apologize both to the Court and to counsel for this. It was an error of the stenographer, and made without our knowledge, but when once in the record could not, by any practice that we are familiar with, be eliminated. There was certainly no purpose in putting it in twice.

The remainder of the testimony that was put in upon our part was put in because we believed it to be material. Some of it, perhaps, was not absolutely necessary, but all tending, as we thought and still think, to elicit some phase or feature of the case. We do not deem it necessary to explain in detail the purpose or effect of each piece of testimony.

At the latter end of page 50 and page 51, we are criticised, unjustly, we think. We cannot remain silent when

our good faith is questioned, and when we are charged with a violation of our duty as members of this court. The thought of having been disrespectful either to the Circuit Judge, or discourteous to any of the parties, never was suggested to us at the time of writing the brief, and such was furthest from our purpose. Since reading the criticism made by the other side, we have been impressed for the first time that the language employed by us might possibly be tortured into what is claimed for it in the brief of appellees. We therefore, at this time, want to disclaim to the Court any purpose to be discourteous to the parties, or disrespectful to the Circuit Judge, or the Circuit Court, or this Court, and if we thought the criticism just, and if we had intended what it is claimed the language employed means, we would lose no time in retracting and apologizing, but we earnestly insist that the charge of "abuse," "innuendo," and "harsh criticism" is entirely unjustified. In each instance we have endeavored to support what we have had to say about the subject, by reference to the record.

At page 35 of their brief, appellees say: "The plaintiffs have called to their assistance Joseph Macdonald, who, in the most unblushing manner testifies that he was voluntarily a party to a scheme to defraud the plaintiffs. * * * He admits thereby that he was willing to enter into a scheme to defraud his neighbor, or persons for whom he pretended personal friendship, at the instance of his employer." The record does not warrant that statement at all. The most that can be contended for by the appellees is, that Mr. Macdonald, in the employ of Mr. Sweeney, did not, while he was in his employ, advise Mr. Clark that he was being defrauded. And we

submit that one would not feel called upon to proclaim from the housetops the fact that his employer was perpetrating frauds right and left, but when required by legal process to testify, upon what principle of law or morals could he or should he claim to be exempt from giving the facts? It is in evidence that Mr. Macdonald quit the employment of appellees and that he refused further employment from them. We might, and could with much reason, argue from this that it was due to the fact that he would not, after discovering the true character of Mr. Sweeney, have any further business connections with him.

At pages 48 and 49 of appellees' brief, we find the following: "From the record and the testimony in this case, it appears that while Patrick Clark was the general manager and representative of the Coeur D'Alene Silver Lead Mining Company, a corporation having its principal place of business at Butte, Montana, and being represented in Idaho only, by Patrick Clark, and owning the Poorman Mine, in adjusting its lines on the east end, found or created a fraction of ground between the Poorman and the O'Neill claims. This fraction was located as the Ella and Missing Link claims. * * * It appears that while Patrick Clark and James Harvey were occupying positions in the employ of the company, taking advantage of the development upon the Poorman claim, and of the facilities which said development offered for the working of the two fractions claimed by them, they drove the 600 and 800 foot levels, *at the expense of their employer* from the Poorman mine, into and practically through these fractions, and with the aid of the machinery, and taking advantage of the investment

of the company, they extracted \$16,524.78 net value in ores from these fractions, and divided it between themselves." * * * We absolutely refuse to be drawn into the trial or discussion of collateral issues, having absolutely no bearing upon the issues in this case. We are not disposed to dodge or avoid any legitimate issue thrust upon us, either at this time or at any time, but we would feel that we had lost the respect of the Court and been recreant to our duty as counsel, if we allowed ourselves to be drawn from the issues properly raised by the pleadings, to some collateral matter having no bearing upon the case. In addition to that, the statements made are absolutely untrue, *and are not supported by the record.* The only evidence in the record upon the subject, or squinting at it even, was drawn from Mr. Patrick Clark, one of the appellants, upon a cross-examination, and it is found at pages 548 and 549, volume II of the Transcript. It is as follows: "Q. What royalty did you receive? A. I cannot remember. *They were allowed so much for mining and concentrating, etc., and what was left over that we received, which was the amount that was there; that is my recollection.*" And at page 561, volume II of the Transcript, the testimony of the same witness is the following: "Redirect Examination by Mr. Stoll. Q. You made some statements, or a statement rather, about some of those footings being the net value realized from these ores. Did I understand you correctly? A. At the smelter. Q. What was the *net value* realized by the owners? A. *I do not remember what it was.* Mr. Heyburn. He has deducted the *freight and the treatment charges, Mr. Stoll.* A. Yes, those are the net results at the smelter. (By Mr. Heyburn.) Q. That is what you got your check for? A. Yes, sir."

That is all the testimony there is in the record upon this proposition. It will be noted that Mr. Heyburn emphasized what he was attempting to draw from the witness by his statement to counsel, viz.: "*He has deducted the freight and the treatment charges, Mr. Stoll.*" Anyone at all familiar with mining will understand that there is a marked distinction between smelter returns and the net value. From the smelter returns, of course, must be deducted the cost of mining.

About the middle of page 49 of appellees' brief, they use the following language: "It is conceded by both sides that except at great expense, this fraction of ground can only be worked in connection with the Poorman Mine." That is absolutely foreign to the issue in this case, and we will not litigate it here. We had a right to hold our property and let the lead and silver sleep forever in the hillside, if we wanted to. It did not lie in the mouth of an intending purchaser to put the price upon it that he saw fit, because, *in his opinion, we could not work it except through his mines.* It takes two to make a contract. Here, again, is raised the question of value, and again we see the materiality of the testimony of Mr. Rice, Mr. Allen and Mr. Justus, as we have heretofore contended, at pages 61 and 62 of our opening brief. It will be remembered that the Circuit Judge held that while Mr. Sweeney was contradicted by these witnesses, the contradictions were upon immaterial matters.

At page 50 of their brief, appellees state: "Clark and Kingsbury made a secret arrangement to sell out their stock in the old company to Culbertson, unknown to their fellow stockholders, quite in keeping with their former plan of working their individual property at the

expense of the stockholders of the company they represented." They cite page 238 of the record in support of this proposition. We respectfully ask the Court to examine that page of the evidence, and we assert with confidence that the charge made is not borne out by the record. Is it going to be seriously urged that it is unlawful for owners of stock in a corporation to sell their holdings, without getting permission from the remainder of the shareholders, and that doing so is such conduct as prohibits parties from maintaining suits in equity to recover property fraudulently procured from them? If so, appellees establish a pretty high standard of conduct.

A rather energetic, but we think a very labored, effort was made in the brief of appellees to establish the fact that we were in error in our opening brief, in attempting to show that a survey had been made of the Ella and Missing Link, prior to the 13th of October, 1899, the date of the purchase. (See pages 63, to and including 87, of Appellants' Opening Brief.) We apologize to the Court for adding anything to the argument there made, but a few additional thoughts have suggested themselves, which we think of importance:

1. It must be noted that drill hole No. 3 was run absolutely parallel with the Ella west line. (See Map, Defendants' Exhibit No. 14, Section A, page 1294, volume IV, Trans.) Is this a guess, an accident, or a survey?

2. At page 325, volume I of the Transcript, the report written by Mr. Culbertson, uses this language at the latter end of the page: "Reference is made to the *longitudinal map* accompanying this report, showing in detail the ore stoped out, and the reserve now in sight." At the latter end of page 326, the report again uses this lan-

guage: "Reference is made to the *longitudinal map* accompanying this report, showing in detail the small quantity of ore stoped from this level."

3. On the question of the "Progress Map" referred to in our opening brief at pages 74 and 75, we want to call the Court's attention to page 709, volume II of the Transcript, testimony of W. Gus Smith, as follows:

"Q. What is the purpose of a progress map? A. It is a *vertical, longitudinal section*, showing where the stopes are located, where the levels are located vertically, one above another.

"Q. What is the purpose of the map? A. It is to show what is stoped out during each month in the different stopes, and what is driven on the different levels.

"Q. Does it show the date and the number of feet that have been run in a given drift or stope, on a certain date, on each date, or practically so? A. During certain periods.

"Q. And does it show the width of the vein? A. It does not.

"Q. The character of the ore? A. It does not.

"Q. Then what does it show? A. It shows the *longitudinal sections*.

"Q. With the development? A. Yes, sir, it shows the vein; if a vein is a foot wide or fifty feet wide, it would appear just the same.

"Q. It shows the progress of the work, does it? A. Yes.

"Q. Did any officer of the company ever suggest to you that the work of McCormick was incorrect, or that they thought it might possibly be incorrect, and ask you to check it up? A. They did not."

At page 713, volume II of the Transcript, the same witness testified:

“Q. Mr. Smith, state whether or not it is a fact that when you made these maps and the progress map, you made a resurvey of all the workings of the mine, into which you could get. A. I did.

“Q. State whether or not you made your map from your actual survey? A. I did, for that portion of the mine.

“Q. Of which you made the resurvey? A. Yes, sir, on all the portion of the mine that was accessible, I made a complete survey and paid no attention whatever to the old maps for those portions. It was only the portions that were inaccessible.

“Q. Mr. Smith, what occasion, or would you have any occasion to make a progress map of inaccessible portions of the mine? A. None whatever.

“Q. Then your progress map was made from an actual survey of yours, was it? A. The portion I made was of course made from an actual survey.

“Q. I say, the live portion of the map? A. Yes, sir, showing the progress since I made the first survey, as well as showing what was done, and accessible at that time.”

It is significant that whenever the appellees desired to establish something concerning the mine with their testimony, they had a ready reference to a map, and proved it with a map, but whenever something transpired with reference to operations within the Ella and Missing Link ground, the immediate announcement was made that they did not know where they were, and that they had no maps. For instance, at page 228, volume I of the Transcript, Mr. Culbertson testified:

“Q. Did the new company, the Buffalo Hump, keep a progress map? A. Later on they did.”

“Q. What do you mean by later on—when did they start? A. Well, I think the first map was got up in September sometime.

“Q. September, 1899? A. In 1899.”

At page 269, Mr. Culbertson testified that he got the maps out and showed them to Mr. Sweeney, on the 12th or 14th of June.

“That was the time he [Sweeney] said he would buy the Ella and Missing Link? A. That was the time the subject first came up.”

And so, all through the record, innumerable references are made to maps, until we approach the Ella lines, at which time maps are lost.

Respectfully submitted,

STOLL & MacDONALD,

W. J. GORDON,

W. W. WOODS,

Solicitors for Appellants.

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Oct. 10. 1902

W. B. Dyer

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IN THE
UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE
NINTH CIRCUIT.

PETITION FOR REHEARING.

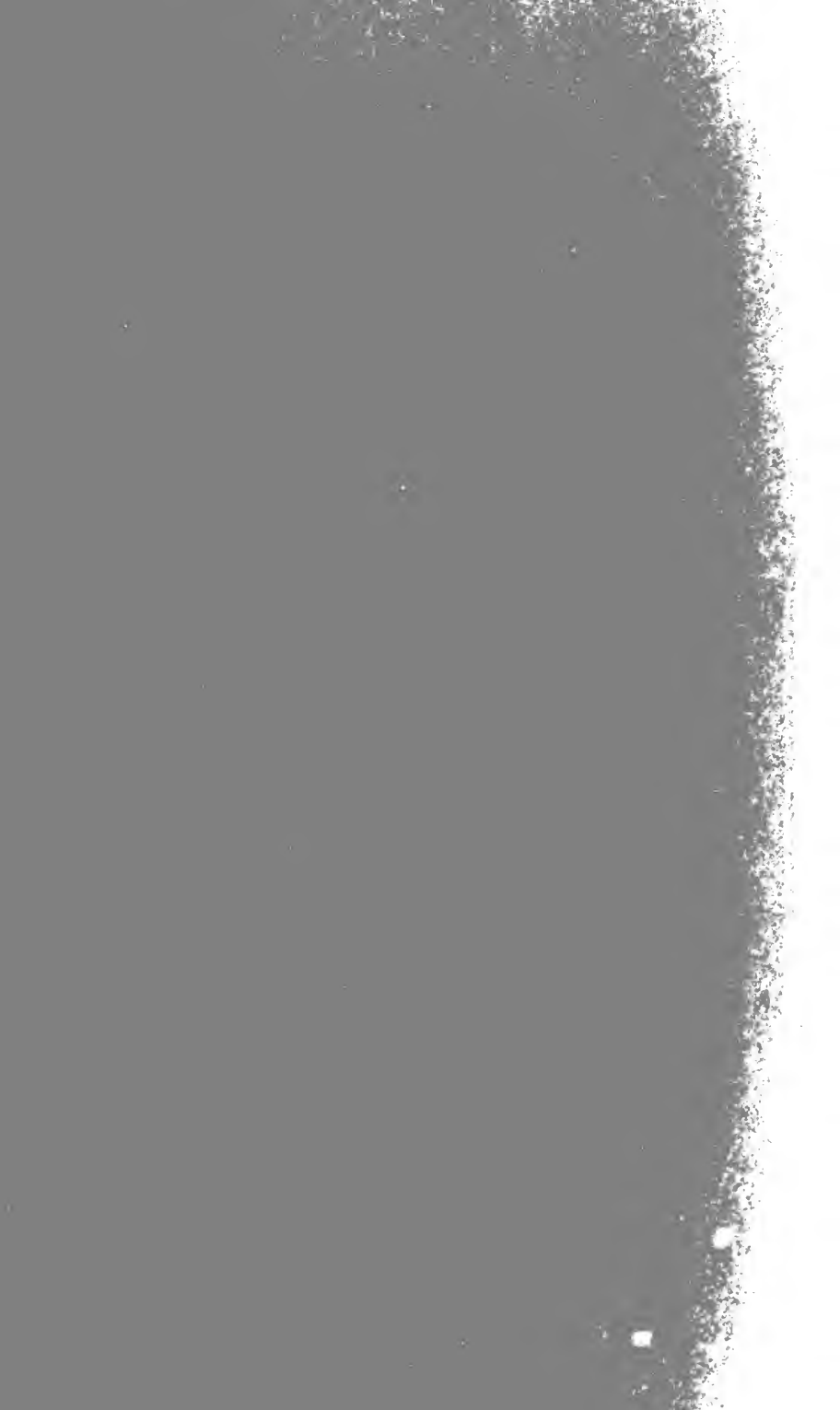
PATRICK CLARK, BENJAMIN C. KINGSBURY,
JAMES P. HARVEY and A. G. KERNS, Adminis-
trator of the Estate of JAMES CLARK, Deceased,
Appellants,

vs.

THE BUFFALO HUMP MINING COMPANY (a
Corporation), and THE EMPIRE STATE-IDAHO
MINING AND DEVELOPING COMPANY (a
Corporation),
Appellees.

Upon Appeal from the United States Circuit Court for
the District of Idaho, Northern Division.

FILED W. T. STOLL,
MAY 16 1903 M. J. GORDON,
Solicitors for Complainants.







IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

PATRICK CLARK, BENJAMIN C.
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Appellants,

vs.

THE BUFFALO HUMP MINING COM-
PANY (a Corporation), and THE
EMPIRE STATE-IDAHO MINING &
DEVELOPING COMPANY (a Corpora-
tion),

Appellees.

No. 870.

PETITION FOR
REHEARING.

The appellants respectfully petition the Court for a rehearing in this case upon the ground that the Court erred in its conclusions: first, on the facts: and second, on the law applicable to the facts.

Points and Argument.

Of course, we concede the time-honored maxim, "He who comes into Equity must come with clean hands," but we do not think that doctrine applicable to the facts in this case. In the opinion, it is said: "To that information (stating it), the "complainant: were not entitled * * * * The withhold-
"ing from the complainants by Culbertson of such information

“constitutes a part of the grievances of which complainants complain, to what extent it is not important to inquire.” With all deference and respect to the Court, we earnestly insist that the record will be searched in vain for anything to justify the conclusion that, “The withholding from complainants by Culbertson of such (or any) information constitutes part of the grievances of which complainants complain,” etc. We do not claim that Culbertson violated any agreement with us, nor do we base our cause of action upon anything arising out of any agreement with him, or the violation of any agreement. It is true, paragraph six of the bill sets up an agreement with Culbertson and the evidence tends to prove that agreement, but it is not charged or proved that he ever violated that agreement.

The cause of action is:

First—That the Buffalo Hump Co. prospected *our ground without our consent*, and discovered valuable ore bodies within it *without our knowledge*, and purchased the claims without disclosing to us *the knowledge so obtained*.

Second—That Culbertson, *our tenant in common*, while Assistant General Manager of the Buffalo Hump Co., and Sweeny, its General Manager, *made false representations to us concerning our property*. We do not allege, nor attempt to prove, that Culbertson ever *suppressed from us the condition of the east end of the Poorman mine, or the condition of any ore discoveries therein*, nor do we contend that *there were any ore discoveries at any time in the east end of the Poorman mine* which, if communicated to us, would have justified the conclusion that the “Ella” had any greater value than we re-

ceived. The fact is, if Culbertson had given us *all the information concerning the condition of the defendant's property*, we would have sold the "Ella" for the same price that defendants paid, while had Culbertson and Sweeny given us the information concerning the condition of *our own property, the thing which we charge as fraud*, we would not have sold it for \$100,000.00. Therefore, the agreement with Culbertson had no relation to, nor bearing upon, the fraud charged in the bill. All reference to the agreement with Culbertson can be eliminated from the bill without destroying its sufficiency. It was bound, however, to come out in evidence, and we felt that the *fair way to deal with a Court of Equity was to set it up in the bill*

It does not appear that the information sought, and which Culbertson agreed to give, was ever intended to be used to the *detriment or prejudice of his employer*, or for any *unlawful purpose*, or that the nature of it was such as to operate to the *disadvantage of his employer*, or to any *unlawful* advantage to ourselves. And here, we say, is the true distinction in this case, and where the Court erred in concluding this agreement to be unlawful in Equity. Apart from this, the sworn answer of defendants (See latter end of paragraph V., p. 34, Trans.) sets up the following:

“but allege that the said *combination shaft*, and all *workings (of said Tiger & Poorman mines)*, *excavations, tunnels, drifts or means of approach in and through any part thereof*, were at all times open, accessible, and subject to the *inspection of the complainants*, or any of them.”

And both Sweeny and Culbertson positively testify and assert that they would have shown us their underground workings at any time. What, then, is there unlawful or fraudulent in the agreement *so far as it affects the defendants in this case?* The information which Culbertson agreed to give us, and which the Court says we were not entitled to, and for the making of a contract concerning which the Court has said it would shut the door of Equity against us, Mr. Culbertson's employer has said he had a right to give to us, and that he would himself have given to us freely and voluntarily.

But, if it be true that the agreement between Clark and Culbertson was immoral or illegal, the most that would follow is that *neither party could take any benefit from it*. The Court would not enforce it in the interest of either party, nor would the Court, *for the mere making of such an agreement, turn either party out of Court and deny him Equity upon the case which remains after that agreement is disposed of*. Such is the plain holding of *McBlair v. Gibbes*, 17 How., 232, and *Brooks v. Martin*, 2 Wall., 70. Here we insist that the record entitles the appellants to the relief demanded in the bill, entirely aside from any benefit claimed by them under the agreement with Culbertson.

We charge that the relation between appellants and Culbertson was known to the Buffalo Hump Co., but the Court finds that there is no evidence upon that point. An examination of the case of *The Distilled Spirits*, 11 Wall., 356, will show that the rule of the Federal Courts is that *knowledge acquired by an agent in a prior transaction is notice to and knowledge of his principal in a subsequent transaction*. Cul-

bertson was the agent of the Buffalo Hump Co., employed by Sweeny, its General Manager (See p. 274, Trans.), authorized to approach appellant Clark for the purchase of these claims. His agency imputes knowledge to his principal, the Buffalo Hump Co., of this agreement, if the agreement existed.

We feel that the great amount involved, together with the magnitude of the questions, justify us in urging the Court to allow us to appear to reargue the questions presented by the record. The record is so voluminous and contains so much matter, that it would be strange indeed if the Court, with the vast amount of labor imposed upon it, should completely grasp or thoroughly digest all of the facts. In the opinion, the Court, among other things, states: "and Patrick Clark, in the course of his operations in the Poorman mine, ran several drifts from the Poorman through the Ella and Missing Line claims into the O'Neil claim, *one of which was on the 1200 foot level of the Poorman mine.*" *The Court is clearly in error here.* At p. 242 of the transcript, Culbertson testified as follows, and it is not denied:

"Q. When was it Mr. Clark authorized you to run through the 1100 or 1200 foot level into the Ella?

"A. He never authorized it.

"Q. He never authorized it? A. No.

"Q. I understood you to say that he gave you permission or authority to do that, or directed you to do it?

"A. No, we took it. There was no authority. We run that at the expense of the Tiger & Poorman Mining Co. *Mr.*

"Clark had nothing to do with that. We were out in that country seeing what we could find."

The question of who ran that drift on the 1200 foot level of the Ella and Missing Link is, it seems to us, of controlling importance in this case, because it is the point at which the trespasses into our ground were committed and the unlawful knowledge of the value of our premises was obtained by the defendant.

And again, the agreement set out in paragraph six of the bill should be construed in connection with the testimony that is given concerning it at p. 478 of the transcript by Mr. Patrick Clark:

"Q. Now state what the consideration was, Mr. Clark?"

"A. He accepted it for the purpose of taking care of our interests there, acting as our agent, and if any ore was found on that end of the Poorman adjoining the Ella, *that he would work it economically for us and give us the net proceeds of our part of it, if any ore was developed in the working of the Poorman mine as depth was attained.*"

And Culbertson, at page 240 of the transcript, testified as follows:

"Q. Was that not part of your agreement with Mr. Clark?"

"A. That I was to use my influence to secure such *equitable arrangement as would be fair to all the parties.*"

And again at page 173 of the transcript, on direct examination, Culbertson says:

"A. * * * Mr. Clark stated that he would see his partners in regard to their each giving me a one-twentieth in-

“terest in the Ella and Missing Link grounds; which would
“make me a fifth interest.

“Q. For what purpose?

“A. And as I was to be manager of the new company I was
“to use my influence towards securing as good terms as possi-
“ble for the working of this ore through the Poorman shaft,
“THE SAME AS IT HAD BEEN DONE BY HIMSELF
“AND CO-OWNERS.”

We think the testimony is harmonious and consistent, and
all should be construed together with the complaint.

The Court below held that we were not entitled to relief
because we had done nothing *to investigate the condition of
the property or protect ourselves against the fraud* (See top
p. 166, Trans.). This Court, in effect, holds that we are not
entitled to relief because in our efforts to protect ourselves, we
went too far—*Brooks v. Martin, supra*, and *McBlair v. Gibbes,*
supra, following a uniform line of cases decided by the High
Court of Chancery in England, hold that parties to an unlaw-
ful agreement still have a good standing in a Court of Equity
if the Court is not called upon to enforce the unlawful agree-
ment, and the Court in none of these cases, hesitated to give
relief to one of the parties to such unlawful agreement, even
where the right to the relief given grew out of such agree-
ment.

The Court in this case, concludes its opinion as follows:
“A Court of Equity will not undertake to balance frauds,”
etc. This seems to be somewhat in conflict with the opinion
of the Court in *Hanley vs. Sweeny*, 48 C. C. A., 619, where

the Court found the complainant Hanley guilty of fraud, and then states, "But all the fraud in the case was by no means committed by the complainant," and then proceeds to give complete relief to the complainant Hanley according to the prayer of his bill. One of the two cases must be erroneous.

The Court has applied to the facts of this case a general rule of law that, in the abstract, must be conceded to be sound, but the application of it we think, is not warranted by the facts; and, *if the Court has misunderstood the facts*, the decision is in effect a denial of justice, a denial of our constitutional right to a trial and hearing by this Court, because, in the condition of this record, the Supreme Court of the United States might hesitate to issue its writ of certiorari to review the error. We can get no question before the Supreme Court except *that upon which this Court has decided the case*. We feel that we are entitled to have this Court state in its opinion, *by reference to the testimony*, what "Part of the information at least so obtained by Culbertson was obtained in his legitimate employment by the defendants, the Buffalo Hump Co. * * * The withholding from complainants by Culbertson of such information constituted," etc.

We present to the Court here a question of great magnitude, one that has never been squarely decided, viz., whether the adjoining owner of a mineral claim has a right to prospect his neighbor's ground at depth through private workings of his own, inaccessible to any person except himself, and there discover great and valuable ore bodies, and purchase that claim without disclosing to the seller the fact of such discovery. The facts are admitted in the record. We feel that this ques-

tion is of such importance that, if this Court will pass upon it, no matter which way, the Supreme Court will issue its writ of certiorari on account of its importance to settle the question.

The fact that the question upon which this Court has decided the case was *not considered seriously by either side as a turning point in the case and has never been but briefly discussed in the argument*, it seems to us should be strong ground for the Court to grant us permission to reargue the case. We earnestly petition the Court for a rehearing.

In conclusion the appellants feel that it is to be regretted that the illness of Judge Gilbert, rendering it impossible for him to sit at the oral argument, and the previous judicial engagement of Judge Morrow, making an extension of time *for oral argument impracticable*, rendered it necessary to submit the case *briefly and imperfectly* to two of the judges instead of the full Court.

If, however, the Court is not disposed to grant us a rehearing, we earnestly petition a further discussion of the questions decided *showing the application of the facts to the rule of law upon which the case has turned*, so that the Supreme Court by its writ of certiorari may, if it sees fit, review the application of that rule to the facts, and if this Court declines to do this then we respectfully petition the Court to certify the questions presented by this record to the Supreme Court of the United States for its decision.

The Court omitted to pass upon the question of our going to New York to take the deposition of Sweeney. An order was entered at Boise by Judge Beatty, on the motion of Mr.

Heyburn (See p. 357, Trans.), authorizing him for the defendants to cross-examine Joseph MacDonald after the time so to do under the rules had elapsed, and as a condition therefor, the Court required defendants by the order to pay the costs and expenses of our going to New York to take Sweeny's deposition, because Sweeny's deposition was not taken and we were drawn there uselessly and needlessly. That order was never appealed from nor excepted to by the defendants. It is the law of the case, and yet Judge Beatty has refused to enforce it (See p. 166, opinion, Trans.). We called it up for review before this Court, and this Court has omitted to decide whether or not we are entitled to relief. We earnestly urge that this question be decided one way or the other by the Court.

Respectfully submitted.

WM. T. STOLL,
M. J. GORDON,
Solicitors for Petitioners.

Spokane, Washington, May 13, 1903

We hereby certify that the foregoing petition for rehearing is, in our opinion, well founded on a point of law, and is not interposed for delay.

W. T. Stoll











